UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR PROTECTIVE ORDER

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STATEMENT OF ISSUE PRESENTED

Under Rule 26 of the Federal Rules of Civil Procedure, whether Plaintiff United States ("EPA") should be permitted to shield documents from disclosure despite the fact that (1) the same types of documents were ordered to be produced in another New Source Review ("NSR") case; (2) the documents are highly relevant; and (3) searching for and producing them would not impose an undue burden on EPA.

Detroit Edison's Answer: No.

CONTROLLING OR OTHER APPROPRIATE AUTHORITY

Ohio Dep't of Human Servs. v. U. S. Dep't of Health & Human Servs., 862 F.2d 1228 (6th Cir. 1988).

Rollins Envtl. Servs., Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991)

SEC v. Collins & Aikman Corp., 256 F.R.D. 403 (S.D.N.Y. 2009)

United States v. Illinois Power Co., No. 99-833-MJR (S.D. Ill.)

INTRODUCTION

In seeking to litigate this NSR case on an expedited schedule, EPA has taken numerous short-cuts throughout discovery in violation of the Federal Rules. This includes dumping over 4.6 million pages of unorganized documents on Detroit Edison in violation of Federal Rule 34(b). It also includes misusing the option under Federal Rule 33(d). In its motion for protective order, EPA seeks to take another impermissible short-cut. It seeks an order prohibiting access to documents from nine of EPA's ten regional offices charged with enforcing the very regulations at issue in this case, including provisions that became effective in 2003.[1] EPA seeks this relief despite being ordered to search for and produce the same types of documents in another NSR case—*United States v. Illinois Power Co.*, No. 99-833-MJR (S.D. Ill.) ("*Illinois Power*"). And while EPA claims that it produced those documents in this case, none of those cover the critical period from 2005 to the present. Rather, with respect to nine of EPA's ten regional offices, EPA asserts that its production from *Illinois Power* is sufficient, and that Detroit Edison is not entitled to any documents from those nine regions after 2004.

EPA's argument ignores the holding in *Illinois Power*. It also ignores the facts and circumstances of this case. Unlike the majority of NSR cases before it, this case involves projects undertaken after 2004—*i.e.*, after the 2002 NSR rule provisions relating to emissions increase evaluations, which are at the heart of this case, were promulgated. Indeed, this is the first, and only, case involving application of these provisions. The documents Detroit Edison seeks from all ten regions after 2004 are thus likely to be even more relevant than those produced in *Illinois Power*. In addition, because *Illinois Power* rejected EPA's burden arguments for

[1] On December 31, 2002, EPA promulgated substantial revisions to the NSR rules, in particular to provisions related to evaluating whether a physical or operational change would

producing 34 years of documents, EPA's burden arguments for producing seven years of documents should be rejected as well. In any event, the importance of obtaining updated documents from all ten regional offices outweighs any potential burden on EPA. EPA's motion for protective order should be denied.

ARGUMENT

I. DETROIT EDISON IS ENTITLED TO DOCUMENTS FROM ALL TEN EPA REGIONAL OFFICES.

There is no question—and EPA does not contest—that the EPA regional offices other than Region 5 have relevant documents. Doc. No. 95 at 18. Rather, EPA's rationale for searching for documents from Region 5 only is that Detroit Edison is located that Region, and the burden of searching for and producing documents from other regions outweighs their relevance. *Id.* at 16-19. EPA's rationale is flawed in many respects.

A. EPA's Arguments Were Rejected in *Illinois Power*, and Should be Rejected Again Here.

In support of its motion for protective order, EPA rehashes many of the same arguments that were rejected in *Illinois Power*. Like here, EPA argued that (1) the burden of the defendant's motion to compel outweighed any possible benefit to such discovery; (2) the defendant was engaged in a "fishing expedition" that would delay the resolution of the action; (3) there was "no benefit" to producing documents from all ten EPA regions; and (4) that EPA searched the "appropriate offices" and produced responsive documents and that no additional production was warranted. *See* EPA's Opp'n to Def.'s Mot. to Compel Discovery at 11-17, *Illinois Power* (Oct. 16, 2000) (Ex. A). The court in *Illinois Power* rejected these arguments, and held that the defendant was "entitled to production of responsive documents from all ten Regions

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result in a significant emissions increase and thus could be a "major modification." 67 Fed. Reg. 80,186 (Dec. 31, 2002) ("2002 NSR rules"). These rules took effect on March 3, 2003. *Id.*

of EPA, insofar as these offices are involved in the enforcement of the Clean Air Act." Order at 4, *Illinois Power* (Doc. No. 87-23[2] at 4). EPA provides no compelling reason to depart from that holding in this case.

Nor could it. EPA's position here is *more* restrictive than the one rejected by *Illinois Power*. Before the court ordered it to produce documents from all ten EPA regional offices, EPA in that case voluntarily produced documents from Regions 3, 4 and 5. Ex. A at 14 n.12. According to EPA, it did so because even though *Illinois Power* was pending in Region 5, Regions 3 and 4 were at the time involved in similar NSR cases. *Id.* EPA refused, however, to produce any documents from the "seven EPA regional offices that [were] not involved in this action or similar actions." *Id.* at 14. To be sure, the court rejected this argument. Order at 4, *Illinois Power* (Doc. No. 87-23). But even if the argument had merit, EPA has since sued utilities in Regions 2, 6, 7, 8 and 9. Thus, even under EPA's own standard, Detroit Edison would be entitled to documents from all EPA regional offices except Regions 1 and 10. EPA's arguments for prohibiting access to nine of EPA's regional offices are baseless, and the Court should reject them for the same reasons the court in *Illinois Power* did.

B. The Documents Detroit Edison Seeks Are Highly Relevant.

EPA's argument that Detroit Edison is conducting a "fishing expedition" also lacks

[2] To avoid duplication, Detroit Edison will refer to documents already filed according to their Docket Number on the Court's PACER system.

merit.[3] Because the NSR program is a national program, documents from the nine other regional offices are just as relevant as those from Region 5. EPA's own conduct confirms this. Despite its recent contention that "Region 5 and EPA Headquarters are *the* relevant offices for this case," Doc. No. 87-17 at 3 (emphasis added), EPA cited a 2000 applicability determination that relied upon EPA correspondence from Regions 9 and 10 in support of its motion for preliminary injunction. Doc. No. 8-15 at 17-18. In opposing Detroit Edison's motion for protective order on the non-tube projects, EPA cited an applicability determination from Region 9. Doc. No. 85-5 at 2. In responding to Detroit Edison's First Set of Requests for Production, EPA directed Detroit Edison to two databases maintained by Region 7. Doc. No. 87-8 at 3. EPA also directed Detroit Edison to EPA's "Clean Air Act Applicability Determination Index," which purports to contain applicability determinations from all ten EPA regions.[4] *Id.* Moreover, in other NSR cases, EPA has regularly cited documents from other regions. For example, in an NSR case in Region 4, EPA cited documents from Regions 3, 5, 7 and 9 in a brief opposing the defendant's motion for partial summary judgment on the proper legal standards. *See* EPA's Resp. to Def.'s Mot. for Partial Summ. J. at 19 n.18, 20, 29 n.27, *United States v. East Ky. Power Coop.*, 5:04-cv-00034-KSF-JBT (E.D. Ky. Feb. 13, 2006) (Ex. B). In other words, while EPA is willing to rely upon and cite selected documents from the files of those regional offices for its own purpose and

[3] Pretrial discovery is to be accorded broad and liberal treatment. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 37.22[2][a] (3d. ed. 2002) ("The standard for determining whether information is relevant for purposes of pretrial discovery is substantially broader than the standard for relevance during trial.").

[4] Based on the description provided on the website, however, this index does not contain any applicability determinations related to PSD. Rather, it relates to the closely related New Source Performance Standard program, National Emissions Standards for Hazardous Air Pollutants, and chlorofluorocarbons.

purported benefit, it refuses to do so for discovery by the party it has sued. That is not permissible. EPA's continued reliance on documents from other regions confirms they are more than sufficiently relevant to overcome its claim of burden.

C. The Government Should Be Required to Update its Production to Include Recent Documents.

EPA also attempts to justify its recycled production by claiming it "reflect[s] nationwide discovery for all relevant years." Doc. No. 95 at 17. Not so. As noted, this case involves projects undertaken after 2004. None of the documents EPA produced in *Illinois Power* from all ten regions cover that time period. The more recent documents Detroit Edison seeks likely address a number of issues related to its defenses. This includes the types of projects other EPA regions and states consider "routine maintenance, repair and replacement," especially in light of the continued development of the case law on the proper standard for "routine." *See, e.g.*, Doc. No. 46 at 11-13 (discussing case law). It also includes the proper method for projecting emissions under the applicable NSR rules, particularly in light of the relatively recently-promulgated 2002 NSR rule provisions.

Moreover, given Detroit Edison's position that EPA's interpretations of the applicable NSR rules are not entitled to deference, Detroit Edison is entitled to "*contemporaneous* construction[s]" of the those rules to support that argument. *United States v. Exxon*, 87 F.R.D. 624, 631 (D.D.C. 1980) (emphasis added). This includes contemporaneous statements by agency officials from the various EPA regional offices. *See, e.g., Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (noting "considerable disagreement" among various EPA "regional offices" regarding the proper interpretation of the regulations in evaluating the

reasonableness of the defendant's conduct).[5] The Sixth Circuit has found similar statements "highly relevant and material" to the agency's understanding of the applicable regulatory provisions. *Ohio Dep't of Human Servs. v. U. S. Dep't of Health & Human Servs.*, 862 F.2d 1228, 1235 (6th Cir. 1988) (quotations omitted). EPA fails to cite any case to the contrary.

II. THE RELEVANCE OF THE DOCUMENTS OUTWEIGHS THE BURDEN OF PRODUCING THEM.

EPA claims that updating its search and production is not justified due to the "heavy burden" and because it has already produced the documents it collected in *Illinois Power*. Doc. No. 95 at 16-19. But EPA's obligations to comply with the Federal Rules and provide an updated production did not end once its work in *Illinois Power* was complete. Those obligations continue. This is especially true here, where the regulatory provisions that are at the heart of this case became effective a mere one year before EPA's previous production ended, and these rules have been applied by EPA, the states, and regulated entities for eight years now. Detroit Edison is entitled to discover how EPA's various regions, and the states, have interpreted and applied these provisions. EPA is "not entitled to special consideration concerning ... discovery, *especially when it voluntarily initiates an action.*" *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009) (emphasis added). Likewise, EPA knew that "large number[s] of documents" are an "inescapable characteristic" of NSR litigation before it sued Detroit Edison. Order at 3, *Illinois Power* (Doc. No. 87-20). Detroit Edison should not be penalized for this fact,

[5] The potential for disagreement among EPA officials and states is likely in the NSR enforcement context, especially in light of the radical changes in EPA's interpretations of the applicable regulations over the past decade. In a 2004 review of Michigan's NSR program, for example, EPA acknowledged that Michigan followed the industry standard for purposes of routine, but claimed it was not "consistent with USEPA policy ... *recently expressed in [the] utility enforcement initiative.*" Doc. No. 58-5 at 18, 20 (emphasis added).

especially given the importance of the issues, the amount in controversy, and the resources of the federal government.

Like it did in *Illinois Power*, EPA asserts that the burden of searching all ten EPA regional offices for documents "far outweighs the benefits." Doc. No. 95 at 19. These arguments have already been rejected in *Illinois Power*. In any event, EPA's arguments are not persuasive. Given that the documents are located in different regional offices, any burden will not fall disproportionately on any one EPA official or office. EPA should not have to spend close to the same amount of time required in *Illinois Power*. In that case, EPA searched for and produced documents spanning over three decades. Here, Detroit Edison is requesting that EPA update that production to cover the past seven years. To the extent such documents are maintained in organized files at EPA's regional offices—and not in disorganized databases like the documents EPA has produced to date (*see, e.g.*, Doc. No. 87 at 9-14)—EPA should be able to produce those documents without difficulty. To the extent they are not, EPA "may not excuse itself from compliance ... by utilizing a system of record-keeping which ... render[s] the production of the documents an excessively burdensome and costly expedition." *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976). Contrary to EPA's assertions, the burden associated with the production of the documents Detroit Edison seeks does not outweigh their relevance. And while Detroit Edison understands the need to streamline discovery, its own unique discovery requests should not be ignored just because no other utility has requested the information.

CONCLUSION

For these reasons, EPA's motion for protective order should be denied.

Respectfully submitted, this 29th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER** was served electronically only on the following attorneys of record in accordance with an agreement reached among the parties:

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DEFENDANTS' OPPOSITION TO
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APPENDIX A:
INDEX OF EXHIBITS

Ex. A	United States' Opposition to Defendant's Motion to Compel Discovery, *United States v. Illinois Power Co.*, No. 99-833-MJR (S.D. Ill. Oct. 16, 2000)
Ex. B	Plaintiff United States' Response to Defendant East Kentucky Power Cooperative, Inc.'s Motion for Partial Summary Judgment No. 1 (Legal Standards-Dale Claims), *United States v. East Ky. Power Coop.*, 5:04-cv-00034-KSF-JBT (E.D. Ky. Feb. 13, 2006)

EXHIBIT A TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 99-CV-833-DRH
v.	)	
	)	
	)	
ILLINOIS POWER COMPANY,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL DISCOVERY

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Plaintiff, the United States of America, submits this Memorandum in Opposition to Defendant's Motion to Compel Discovery filed September 29, 2000. The United States has also filed a related a Motion for a Protective Order simultaneously herewith.

INTRODUCTION AND BACKGROUND

The background of this action is set forth in the Introduction and Background sections of the United States' Memorandum in Support of its Motion for a Protective Order, which are incorporated herein by reference. In further introduction to this Opposition, Defendant's Discovery Requests and the document production by the United States are summarized below.

Defendant's Document Request. Defendant states it has "sought in discovery to uncover the documentary history of the United States' interpretation of the applicable requirements." Memorandum in Support of Defendant's Motion to Compel at 1 (emphasis added) ("Def.'s Mem."). The "requirements" in this case are all legal ones – provisions of either the Clean Air Act that have been entrusted to the EPA Administrator to carry out or of the regulations EPA has issued under that Act. If IPC had meant by those terms ("documentary history" of legal "requirements") the kinds of documents commonly considered in construing a statute or regulation -- things like the administrative record that was the basis for a rule, or published or publicly disseminated interpretations or applications of a rule of law by the agency charged with administering it – the parties would have no discovery dispute. EPA has searched for and produced such documents already (and much more, as described below).

IPC's motion does not seek these things; it instead seeks wide ranging discovery from every instrumentality of the United States of any document that makes any mention of the

regulations at issue here -- or even certain words used in those regulations. The vast majority of that material is irrelevant, and the burden of such a production outweighs significantly whatever marginal value Defendant tries to attribute to such material. Indeed, as will be shown, the significant production already conducted here by EPA goes well beyond any reasonable claim for discovery by Defendant.

Defendant served its First Request for Production of Documents on the United States on April 24, 2000 ("Defendant's Document Request" or "the Request"). See U.S. App at Tab 21.[1] Defendant's Document Request sets forth 32 broad categories of documents that it sought from the United States. In addition to seeking relevant documents related to the Baldwin facility and the violations alleged in the Complaint, Defendant's Document Request seeks broad discovery of all documents in the possession or control of the United States that refer in any way to the Clean Air Act regulations that EPA seeks to enforce in this action. A single example illustrates both the burdensome nature of Defendant's Document Request and the irrelevance of the discovery sought. The Request seeks:

> All documents prepared or dated at any time since 1971 that reflect, refer, relate to or identify criteria to be applied by you, Illinois or other persons to differentiate maintenance, repair, or replacement that is "routine" from that which is "non routine" for any purpose, including without limitation for purposes of the Clean Air Act Modification Rule.

Defendant's Document Request No. 19 (emphasis added). The Request expressly defines "you" [Plaintiff] to include not only EPA, the agency that is charged with implementing the

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[1]References to 'U.S. App. at ___' are to the Unites States' appendix of documents submitted in support of this Opposition, including various letters between counsel, declarations, and some discovery documents.

Clean Air Act, but all other agencies and contractors of the United States (Request at 1) (U.S. App. at Tab 21). Further, the Request is specifically not limited to documents referring to the term "routine" as used in the Clean Air Act regulations at issue.

Thus, by its express terms this request seeks all documents relating to "routine" versus "non routine" maintenance throughout the entire U.S. government, without limitation to the Clean Air Act, or even to EPA.[2] The request is overbroad, sweeping within it anything from manuals on fighter jet maintenance on U.S. Navy F-14s, to roof repair at Yosemite ranger stations, to bottom painting of U. S. Coast Guard cutters, mandating a search not just of every office of the U.S. government - from the FAA to the FBI, from NASA to the Post Office – but of every single consultant or contractor to any part of the U.S. government as well (from General Motors to General Electric) -- from 1971 to the present.

It would be difficult to draft a more burdensome request. Defendant tells the Court it has "intentionally drafted its production requests narrower than the scope of the issues." Def.'s Mem. at 7. The breadth of Defendant's Document Requests suggests otherwise.

United States' Response to Defendant's Document Request. The United States has made repeated attempts to work with Defendant to narrow its document request to a reasonable scope. However, Defendant has rejected all of those attempts.

Upon receipt of Defendant's April 24, 2000 Request for Production of Documents, the

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[2] The United States at first assumed that this overbreadth must have been unintentional, and pointed out to Defendant that it would encompass plainly irrelevant documents in EPA offices that have nothing to do with the Clean Air Act, *e.g.* offices that implement water or hazardous waste programs (and indeed to every office of the United States). However, Defendant declined, and now seeks to compel the United States to execute the search as written.

United States sent a letter to Defendant dated May 4, 2000 (see U.S. App. at Tab 25), identifying areas in which the United States believed the scope of Defendant's Request was too broad and burdensome. The United States invited Defendant to discuss whether a stipulation on such issues was possible. The objections identified in that letter included objections to searching the additional offices and files that Defendant now seeks to compel the United States to search. In the May 4 letter, the United States repeated its earlier offer to produce to Defendant a core set of relevant and responsive documents.[3]

Despite a subsequent meeting of counsel convened by the United States to discuss these matters, and several further attempts by the United States, both orally and in writing, to gain further clarification from Defendant regarding precisely *which offices or agencies* it requests the United States search for what *types* of documents (see, e.g., Letter dated July 28, 2000 at U.S. App. at Tab 23), Defendant stood on its original demand.

The United States undertook an extensive search for documents that are responsive to Defendant's Document Request and produced volumes of material to Defendant, together with a detailed index thereto. EPA's search included the files of numerous headquarters and regional EPA offices likely to contain responsive and relevant material, including the following:

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[3] Many of Defendant's document production requests and interrogatories are very similar to those served by the defendants in similar pending actions against owners and operators of coal-fired electric generating units. In an early effort to expedite and coordinate the United States response to these parallel discovery requests, the United States proposed to make the 'core' set of documents requested by all defendants available to each of the defendants. See Letter from C. McCabe to Counsel, Feb. 25, 2000 (U.S. App. at Tab 26).

- The Air Enforcement Division of the Office of Enforcement and Compliance Assurance (EPA Headquarters)
- The Office of Policy Analysis and Review, in the Office of Air and Radiation (EPA Headquarters)
- The Clean Air Markets Division of the Office of Air and Radiation (EPA Headquarters)
- The Office of Air Quality Planning and Standards in the Office of Air and Radiation (EPA Headquarters)
- The Office of General Counsel (EPA Headquarters)
- The Office of Regional Counsel, Air, Water, Toxics and General Law Branch (EPA Region III)
- The Air Protection Division (EPA Region III)
- The Environmental Accountability Division (EPA Region IV)
- The Air, Pesticides, and Toxics Management Division (EPA Region IV)
- The Office of Regional Counsel (EPA Region V)
- the Air and Radiation Division (EPA Region V)

Within each of these offices, personnel searched for and produced documents responsive to Defendant's Document Request.[4] As the Request generally described sweeping categories and did not specify the documents sought, EPA used document production requests as well as lists of the types of documents that were likely to be responsive. For examples of how

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[4] As noted above, similar document requests were served by defendants in other actions concerning facilities within three EPA regions, Regions III (Philadelphia), IV (Atlanta) and V (Chicago). At the request of and as an accommodation to defendants, the United States made the responsive documents located in all three Regions available to defendants in all the actions.

searches were conducted in various EPA offices, see the Declarations of D. Svendsgaard and C. Mikalian (U.S. App. at Tabs 17 & 10, respectively). Searches in certain offices, such as EPA's Office of Air Quality Planning and Standards (OAQPS) are especially noteworthy because of the nation-wide role of that office in regulatory matters, such as the regulations at issue in this case. OAQPS is involved not only in developing such regulations but also in addressing issues arising from such regulations. This is true regardless of where in the Nation the issue might arise. On the kinds of regulation at issue in this case, OAQPS is the EPA leader and clearinghouse for development and implementation. As explained by D. Svendsgaard, an environmental engineer familiar with OAQPS and its role in EPA, OAQPS:

> leads national efforts to meet air quality goals . . . develops regulations to reduce air pollution . . . is involved in preparing and implementing all Clean Air Act regulations for stationary sources . . . [and] works closely with EPA Regional offices to ensure integration of rules, policies, and guidance . . . .

U.S. App. at Tab 17, pars. 1 & 2. OAQPS also coordinates on these regulatory issues with state and local agencies and developed the regulations (sometimes known as the "WEPCo" rule) that are at the center of this civil action. OAQPS also provides training to various technical aspects of air pollution control to other parts of EPA. D. Svendsgaard , U.S. App. at Tabs 17, pars. 2 & 3.

Document searches in EPA's Office of General Counsel also span the Nation because of OGC's role as "the primary legal adviser" to the EPA Administrator and provider of "legal services to all organizational elements of the Agency" – including assistance "in the formulation and administration of the Agency's policies and programs." 40 C.F. R. § 1.31.

The United States' production effort involved a search of the files of hundreds of

EPA employees[5] and yielded many tens of thousands[6] of non-privileged documents.[7] Id. The United States then provided these documents as quickly as possible, in a rolling production. First, the United States produced those documents specifically pertaining to Defendant's Baldwin plant on June 16, 2000. The United States then reviewed, copied and produced the more general documents requested by Defendants from numerous offices of EPA, in an effort that began in June and was essentially completed in September.[8] In addition, the United States made many additional tens of thousands of documents available to

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[5] From just a partial list of various EPA offices searched, document productions came from at least 250 people. See Declarations of D. Schnare on OGC, OECA, and some other EPA Headquarter offices and (searched files of 95 people), of C. Mikalian on EPA Region 4 (included between '40 and 50' people in search) and of D.Svendsgaard (searched the files of over 100 individual throughout OAQPS). See U.S. App. at Tabs 14,10, & 17, respectively. These counts do not include at least two very large parts of the production - those done in EPA Regions 3 and 5. Documents also were produced from various central files or office files. Those are not attributed to any single person. See D. Svendsgaard Declaration at pars. 4 & 9 (U.S. App. at Tab 17).

[6] See par.3 of B. Walinskas declaration (U.S. App. at Tab 19) & par.6 of D. Schnare Declaration (U.S. App. at Tab 14).

[7] In light of the nature of Defendant's Document Request, a significant number of the documents Defendant seeks are privileged, e.g., attorney-client communications, attorney work product, deliberative, pre-decisional documents. (The United States is preparing an appropriate listing privileged documents that were located within the offices that have been searched, as described above, so that the United States can produce privilege logs consistent with its obligations under the Federal Rules and the scope of discovery allowed in this case.) Similarly, the additional documents that Defendant seeks from other locations could be expected to encompass a high proportion of privileged documents. The high volume of privileged material among these documents underscores the overly broad and intrusive nature of the discovery sought by Defendant.

[8] The breadth of the Requests in this case (and ongoing discovery in other cases) triggered such a broad, wide-ranging search that EPA continues to learn of some additional, potentially responsive material from time to time, and of course such material will be produced.

Defendants for review, by identifying and providing indices to large collections of publicly available documents. See Declaration of B. Buckheit (U.S. App. at Tab 6, ¶ 5).

Finally, in addition to producing the documents described above, to guide Defendant's review of these materials, the United States has produced approximately 600 pages of indices to the documents produced. These indices list, for each Bates number range, the document owner, office name, and general subject matter.

ARGUMENT

I. Defendant's Requests for Additional Document Discovery are Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

A. *United States v. Farley* Teaches that Unofficial Statements by Agency Employees are Not Relevant to Determining the Meaning of a Regulation and are Not Discoverable

As explained in the United States' Memorandum of Law in Support of its Motion for a Protective Order ("United States' Protective Order Memorandum"), filed simultaneously herewith, the Seventh Circuit made clear in United States v. Farley, 11 F.3d 1385 (7th Cir. 1993), that unofficial statements by agency employees are not relevant to determining the meaning of a regulation and are not discoverable. United States' Protective Order Memorandum at 7 - 12.

Yet, these are exactly the types of documents that Defendant's Motion to Compel seeks to require the United States to search for and produce. The United States already has produced the applicability determinations,[9] guidance memoranda, and other official

[9] 'Applicability determination' is shorthand for a formal decision by an appropriate government official on whether a particular source of pollution falls within a particular regulation. A source (continued...)

statements that are relevant under Farley (see, e.g., B. Buckheit declaration at par. 5 (U.S. App. at Tab 6); U.S. Supp. Response to Interrog. No. 9 (U.S. App. at Tab 20; D. Svendsgaard declaration at par. 8 (U.S. App. at Tab 17); and D. Schnare declaration at par. 3 (U.S. App. at Tab 14). As described in Defendant's Motion to Compel, Defendant now seeks to require the United States to conduct a nationwide search, through numerous additional offices of EPA, and indeed every other agency of the United States, looking for unofficial statements made by employees of the United States or its contractors, referring in any way to the regulatory provisions cited in the United States' Complaint or the use of the terms "routine" or "non-routine" maintenance, repair or replacement in any context. See Document Request No. 19 (p. 10) (U.S. App. at Tab 21).

Defendant has not explained the relevance and purpose of the additional discovery it seeks in its Motion to Compel, but it is apparent that Defendant hopes to find statements that support its interpretation, or counter the United States' interpretation, of the "routine maintenance" exemption to the Clean Air Act modification rule. However, Farley makes clear that unofficial statements of agency employees are simply irrelevant to the determination of the meaning or scope of a regulatory provision.

B. Defendant Has Not Demonstrated that the Documents Sought are Relevant to Any of its Defenses.

Defendant has made no effort in its Motion to Compel to demonstrate that the additional discovery it seeks is relevant to any of the other defenses raised in its Answer, e.g.

[9/](...continued)
may request such a determination.

estoppel, laches, or lack of fair notice.[10] See Defendant's Response to Amended Complaint, at 16-20. Nor can Defendant make such a demonstration of relevance.

In Farley, the Seventh Circuit specifically rejected Farley's argument that he needed discovery of intra-agency memoranda and communications to support his similar defenses of detrimental reliance, vagueness, and notice:

> The merit of [the detrimental reliance] defense turns not on the substance of intra-agency communications but on the content of publicly articulated policy. The views of agency employees contained in intra-agency documents are not, however, expressions of FTC policy. Id. Rather they are part of the exchange of ideas--the give and take--central to the formulation of such policy. Farley's detrimental reliance claim, therefore, is not a basis for admitting the documents in question.
>
> ***
>
> The FTC's internal documents are not relevant to Farley's claim that the FTC regulation defining the investment-only exemption, 16 C.F.R. § 802.9, is impermissibly vague. This is a matter of statutory interpretation and constitutional analysis, a process which does not require the court to review the postulations of agency staff members as to the meaning of the investment - only exemption. The FTC documents are also not relevant to Farley's contention that the government has failed to state a claim on which relief may be granted-this is a question of law on which the FTC documents can shed no light. Nor are the documents relevant to Farley's claim that the FTC's regulations did not provide adequate notice that he was required to report his initial West Point investments. Since the documents in question were for intra-agency use and not general distribution, they reveal nothing about the adequacy of the public notice provided by the regulations. Post-publication discourse among FTC staff about the meaning of the HSR regulations is irrelevant to the central issue of this defense--determining whether Farley should, after reading the regulations, have understood that his purchases did not fall within the definition of the investment-only exemption set out therein. To resolve this question, the court need look only to the language of the regulation and any official, public interpretations of

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[10] The "fair notice" doctrine holds that a finding of liability and penalties for violation of a regulation are precluded where the regulation fails to provide fair warning of the conduct required or prohibited. See e.g., U.S. v. Chrysler Corporation, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998) (citations omitted); U.S. v. Hoechst Celanese Corp., 128 F.3d 216, 224 (4th Cir. 1997), cert. denied, 524 U.S. 952 (1998)(citing Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir 1976)); Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission, 681 F.2d 1189, 1192 (9th Cir. 1982).

it.

Id. at 1391 (emphasis added). See also General Electric Co., 53 F.3d 1324, 1329 (D.C. Cir. 1995) (court examines adequacy of notice "in the most obvious way of all: by reading the regulations and "other public statements issued by the agency" to determine whether "a regulated party acting in good faith would be able to identify with 'ascertainable certainty'" the conduct required or prohibited).

Thus, the defenses raised by Defendant provide no justification for the overbroad and burdensome discovery it seeks.[11]

II. The Heavy Burden That Defendant's Motion to Compel Additional Discovery Seeks to Impose on the United States Outweighs any Possible Benefit of Such Discovery.

In addition to seeking irrelevant documents, Defendant's Motion to Compel seeks to impose an enormously resource-intensive and time-consuming burden on the United States, after the United States has spent months of diligent effort in searching for and producing the documents that could reasonably lead to the discovery of admissible evidence in this action. Based on the efforts required to complete the very substantial search already conducted by

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[11] Defendant's Answer also suggests that Defendant attributes this action to some improper motive on the part of EPA, although it does not go so far as to raise defenses of selective prosecution or bias. No discovery should be permitted to allow Defendant to explore its vague allegations of improper motive. It is fundamental that executive branch officials have extremely broad discretion in the enforcement of federal statutes. See Wayte v. United States, 470 U.S. 598 (1985); Dacey v. Dorsey , 568 F.2d 275 (2d Cir. 1978) cert. denied, 436 U.S. 906 (1978). The exercise of this discretion is normally immune from judicial scrutiny. Moog, Industries v. FTC, 355 U.S. 411 (1958); City of Seabrook v. Costle, 659 F.2d 1371, 1374 (5th Cir. 1981) ("the branches of government charged with the investigation of violations of the law and with enforcement of the law have traditionally been afforded broad discretion in carrying out these duties"). Defendant has alleged no facts supporting a claim of selective prosecution or bias.

EPA. a general nationwide search of even parts of the files of the numerous offices of EPA and other federal agencies that Defendant seeks to compel would require an enormous commitment of resources and time to complete. See pars. 3 & 4 of B. Buckheit declaration (U.S. App. at Tab 6), explaining that even just part of such a search would mean reviewing "over two thousand linear feet of internal agency paper files (over ten million pages) and 26,000 megabytes of computer files, that would have to be reviewed for potentially responsive documents."

The time required for this vast "fishing expedition" would delay the resolution of this action significantly. Such delay would be in Defendant's interest and put off even longer the installation of pollution controls on Defendant's Baldwin plant.

A. The Federal Rules Require Defendant to Demonstrate that the Benefit of the Additional Discovery it Seeks Outweighs the Burden of Producing It.

The Federal Rules of Civil Procedure require a balancing of the benefit of the production against the associated burdens. Fed. R. Civ. P. Rule 26(b)(2). The court shall limit discovery if it finds that:

> The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving those issues.

Fed. R. Civ. P. 26(b)(2)(iii); see Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (noting that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

Under Rule 26(b)(2), as amended, it is not enough merely to concoct a tenuous theory of relevance without regard to burden. Rather, the Rule requires a showing that the benefits

outweigh the burdens of the production:

> It is no longer sufficient, as a precondition for conducting discovery, to show that information "appears reasonably calculated to lead to the discovery of admissible evidence." After satisfying this threshold requirement, counsel must make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe would impose . . . .

In re Convergent Tech. Secur. Litg., 108 F.R.D. 328, 331 (N.D. Cal. 1985). In accordance with the Rule, courts in this Circuit carefully weigh the benefits of production against the burdens imposed. See, e.g., Greer v. Bd. Of Educ. of Chicago, 2000 WL 796153 *2 (N.D. Ill. June 20, 2000) (setting out standard and denying discovery after evaluation of burden and benefits); Simon Prop. Group, L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (same); Ellis v. Fortune Seas, Ltd., 175 F.R.D 308, 310 (S.D. Ind. 1997) (language in Rule 26 added for the "express purpose of enabling courts to keep a 'tighter reign' on discovery").

It is important to note that, under Rule 26, "[t]he party seeking to compel discovery bears the burden of persuading the Court of its entitlement to that discovery." Ty, Inc. v. Salvino, Inc., 1999 WL 162774 *1 (N.D. Ill. 1999).

B. Defendant Has Failed to Demonstrate that the Benefit of the Additional Documents It Seeks Outweighs the Burden of Searching for and Producing Them.

Defendant has not satisfied its obligation to show that the benefit from the discovery sought outweighs the burden of production. Indeed, Defendant has not even demonstrated how the discovery it seeks could lead to the discovery of admissible evidence. Instead, Defendant simply insists upon discovery from various locations without regard to the type of information sought. Defendant also failed to address the other side of the Rule 26 inquiry,

the manifest "burden or expense" of the proposed discovery, limiting its analysis on this point to the observation that the U.S. government is plaintiff. Def.'s Mem. at 22.

Each of the five categories of additional documents that Defendant's Motion seeks is addressed in turn below, with a summary of production to date and analysis under the legal standard set forth above.

1. Documents from All EPA Regional Offices.

Defendant requests this Court to compel the United States to search the seven EPA regional offices that are not involved in this action or similar actions.[12] Defendant offers several arguments to support its demand.

First, Defendant notes that, in an administrative proceeding involving the Tennessee Valley Authority, EPA cited to two documents signed by officials in Regions IX and X. See Def.'s Mem. at Tab 2. Defendant omits the fact that these very documents, as well as many others like them, have *already been produced* to Defendant in this case. The two documents cited are examples of final, written analyses, signed by an official with delegated authority sufficient to speak on behalf of the Agency, in response to requests for a determination as to whether the Clean Air Act "major modification" rules apply to a particular facility (referred to as "applicability determinations"). The United States has endeavored to produce all such responsive applicability determinations and similar official statements -- such as guidance documents or policy statements – regardless of which Regional or other EPA office

[12] As noted above, the United States has made available to Defendant documents not only from EPA Region V, in which the Baldwin facility is located, but also documents produced for similar cases against coal-fired electric power plants located in EPA Regions III and IV.

generated the correspondence.

Despite this production, Defendant asserts a generalized request to search all ten EPA Regional offices. Although Defendant's Motion to Compel makes no attempt to specify what more it is seeking from these offices, Defendant's Document Request provides more detail. For example, Defendant's Request Number 23 seeks "all documents *reflecting, referring or relating to* any and all applicability determinations." Just as a court may refer to precedent to inform its decision, EPA looks to its prior determinations in resolving new requests for such determinations. While the determinations themselves are relevant, the supporting documentation such as staff notes, submissions, internal discussions and memoranda are not relevant, nor even discoverable. See Farley, 11 F.3d at 1391. Defendant has not overcome this first hurdle in the Rule 26 analysis: there is no benefit from the production.

Second, Defendant refers to EPA as a "unitary body" and from that implies the other Regions' offices must contain relevant documents. But only one Region was involved in developing the case against the Illinois Power Company -- Region V. The United States has searched the appropriate offices of that Region and produced responsive documents. Insofar as other parts of EPA were involved (e.g., the EPA Headquarters Air Enforcement Division), EPA has searched those offices and produced responsive documents. As for those offices involved in setting policy, developing the legal and regulatory positions of the Agency, and disseminating guidance to the Regional offices on matters relevant to the litigation more generally (e.g., the Office of Air Quality Planning and Standards, the Office of Air and Radiation, the Office of General Counsel, the Air Enforcement Division of the Office of Enforcement and Compliance Assurance), they too have been searched and have produced

responsive documents. Through these central locations and through other efforts made by EPA to collect in one place materials of general interest – e.g., centralized collections of guidance documents, applicability determinations, and the like -- Defendant has the relevant materials not just from Region 5, but from all across the Agency.[13]

Third, Defendant complains that EPA is enforcing a "secret law" against it, referring to its contention that it has not had "fair notice" of the United States' "new interpretations." As shown above, it is clear that unofficial, intra-agency documents can form no part of a "fair notice" claim. The only documents that are germane to that defense are those that reflect communication directly from the Agency to the entity making the claim, or public statements made by the Agency to the regulated community at large. These have been produced or, in the case of statutes and regulations, are freely available. The law that EPA is applying is no more "secret" than that found in a law library, as fully explained by the documents Defendant already has. While the search of other Regions will not produce benefits, it will result in very significant burdens. The exhaustive discovery already undertaken would have to be repeated in seven Regions that have no responsibility for or involvement with this civil action or any of the similar enforcement actions filed at the same time as this one. The burden for searching even one more Region or office (as has been done for Regions 3, 4, and 5) would be very significant – as can be inferred from the work already done. See, e.g., D.

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[13]For example, as described in U.S. Supplemental Response to Interrogatory No. 9, Defendant has access to various resources that discuss the rules and statutory provisions that make up the PSD and NSPS programs. Such resources include the EPA Technology Transfer web site, the New Source Review Policy and Guidance Database the five-volume NSR Guidance Notebook; and the EPA OECA Applicability Determination Index (U.S. App. at Tab 20).

Svendsgaard Declaration for example of search effort in an EPA office (like OAQPS) & C. Mikalian Declaration for example overall search efforts in an EPA Region IV (U.S. App. at Tab 10).[14] Again, the balance under Rule 26 compels denial of Defendant's Motion.

The courts have barred unduly burdensome production in analogous circumstances. For example, the Ninth Circuit found that an employment discrimination plaintiff's attempt to obtain a company's worldwide policies for discharging employees and for closing facilities was unduly burdensome. Sorosky v. Burroughs Corp., 826 F.2d 794 (9th Cir. 1987). The court found that "[w]ithout a more specific showing that the burdens of production would be minimal and the requested documents would lead to relevant evidence," the district court correctly determined that burdens of the request outweighed their potential benefits. Id. at 805. Similarly, in Aramburu v. Boeing Co., 885 F. Supp. 1434 (D. Kan. 1995), plaintiff sought the production of some 1,700 documents to assess the actions of management in regard to his employer's attendance policy in support of disparate treatment claim. The Court ruled that only actions of his immediate supervisors were legally relevant, and thus found the magistrate's order compelling production of the 1,700 records to be clearly erroneous. Id. at 1441-42.

2. Documents Relating to Industries other than Electricity Generators.

Defendant's arguments relating to other industries is the same as those set out above.

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[14] See also Declarations from J. Kruth (U.S. App. at Tab 9) and M. Starus (U.S. App. at Tab 15), in which these EPA Region 5 paralegals describe the parts of the document production work to which they were assigned. Such work likely would have to be replicated in any other office from which documents would have to be produced.

Defendant has argued that because EPA cited to documents pertaining to other industrial sources in an administrative proceeding, the United States may eventually refer to such documents in this proceeding and, thus, such documents should be produced. Again, the specific documents cited by Defendant have *already* been produced. Insofar as Defendant is moving to compel the production of similar documents, it is unclear what documents Defendant seeks. Defendant fails to cite a document production request in this regard. The United States has offered to "consider requests for particular documents or a reasonable category of documents." Defendant has not bothered to provide greater specificity in this regard. See Letter of July 28, 2000, at U.S. App. at Tab 23.

Defendant may now "clarify" that its Request includes every document mentioning any of the statutory or regulatory terms at issue, concerning any industry whatsoever. Of course, this request would include all EPA documents since the passage of the Clean Air Act some thirty years ago -- an avalanche of extraneous paper. While the benefit from the search is vanishingly small, if any, the time and expense of a search of all files (presumably in all EPA Regions) that are associated with any type of industrial source of air pollution would be enormous. One example of such burden from a single EPA Region comes from EPA Region 5, in the form of a file room that holds over 1,400 linear feet of paper files and that includes assorted "inactive" (i.e. old) enforcement files of cases and administrative proceedings that were brought or considered against various sources of air pollution in EPA Region 5. See M. Clark Declaration, U.S. App. at Tab 8. These files are organized principally by state (Id. at par. 5) and not by subject matter or category of air pollutant source (e.g., boiler, refinery, steel making). While these inactive files concerning other air pollution

sources may include some document responsive to Defendant's broad requests, the burden in searching 1,400 feet of old material concerning other industries not at issue here (i.e., every air emission source regulated under the Clean Air Act, from automobiles to dry cleaners) is not warranted here. This one example must be multiplied several times to encompass the burden for other offices in EPA Region 5[15] – and multiplied many times over again for the additional nine EPA Regions, and then expanded to include other EPA components. This amounts to miles of extraneous paper.

Moreover, Defendant already has the relevant information concerning other industries. If what Defendant is really seeking through this request are the "applicability determinations" that EPA has made pertaining to the New Source Review and New Source Performance Standards programs, the United States endeavored to make all these determinations available to Defendant – *regardless of what industrial source category was involved.*[16]

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[15] For example, similarly unwarranted burdens would be imposed by requiring general review and production from the 'Non-Superfund Case File Room' maintained for Office of Regional Counsel in EPA Region 5. That file room includes more than 1,700 feet of materials from both open and closed enforcement cases all manner of persons and companies under a series of environmental statutes. The file room includes Clean Air Act case materials, but the files are organized basically by case name. C. Stimson Declaration (U.S. App. at Tab 16). The burden of searching though each of these case files, about 9,080 of them in all, would be very significant.

[16] See, e.g., U.S. Supp. Answer to Interrog. No. 9. (U.S. App. at Tab 20) and page 3 of B. Buckheit Declaration which identifies collections of EPA 'legal and policy determinations' available to Defendant, including an EPA applicability determination index, and an EPA policy and guidance data base covering EPA-authored documents (U.S. App. at Tab 6). As Defendant acknowledges, EPA has agreed to provide copies of the original determinations to Defendant. To the extent that two such determinations from hundreds were omitted as Defendant charges, Def.'s Mem. at 15 n. 6, the oversight was inadvertent. If the issue had been brought to the

(continued...)

3. Archived Documents.

Defendant misstates the position of the United States and the production of documents to date as to "archived documents." Defendant claims the United States "pirouetted and informed IPC that it would not be producing archived documents" and "has been unwilling, or possibly unable without additional investigation, even to inform IPC of the scope (e.g., the sources and dates) of archived documents." Def.'s Mem. at 17-18. Defendant is incorrect.

First, on July 31, 2000, the United States produced a collection of responsive documents obtained from EPA Region V archives that pertain to the Defendant, Illinois Power Company, and to the Baldwin Generating Station, the facility at issue in this action. See Letter from P. Lee to P. Gutermann, dated July 31, 2000 at U.S. App. at Tab 27).

Second, as part of the United States' effort to resolve issues involving archived documents, the United States provided details regarding EPA's archiving policies in a letter dated July 28, 2000, and suggested for Defendant's consideration an approach under which EPA would secure indices to archived documents, which Defendant could then use to select particular collections of materials.[17]

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[16](...continued)
United States' attention, the production would have been re-verified, and the documents certainly would have been provided.

[17] Specifically, the United States explained that:

> In general, archived materials may be maintained as long as 20 years . . . . [I]t appears that in most cases, EPA's files are archived by the name of the relevant plant, company, or case..... (continued...)

The United States' proposal from July 2000 met with silence – until this Motion to Compel.[18] In the Motion, Defendant appears to seek the production of additional unspecified archived documents. Some of document management reports that EPA Region 5 periodically requests from National Archives Record Administration ("NARA") -- see A. Rzeznik Declaration, U.S. App. at Tab 13 -- illustrate the size of the burden inherent in blanket searches of archives apparently requested by Defendant. As of October, for example, NARA held over 20,000 boxes of material submitted to it by EPA Region 5 alone. Id. at par. 7.

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[17](...continued)

Given this general structure of EPA's archiving system, we are willing to provide indices to the archives where they are available. In addition, if you identify a reasonable number of files to be retrieved, either using a company, plant, or case name, or by identifying a file on an index we provide, we are willing to retrieve files from archives upon your request and to produce the non-privileged and responsive documents therefrom.

Letter dated July 28, 2000, at U.S. App. at Tab 23.

[18] On page 2 of a letter dated August 25, 2000 (U.S. App. at Tab 22), which purported to respond to the letter dated July 28, 2000, Mr. Paul Gutermann made the following passing reference to archived materials:

> "Since the United States first identified these sources [including archives] of documents as ones they would not be producing in its initial production of documents, the United States has assiduously failed to inform IPC, without equivocation, whether it would search for responsive documents from these sources. With respect to proposals made in compromise, the United States has yet, for example, failed even to inform IPC what the archival dates and procedures are."

Letter from P. Gutermann to N. Veilleux, Aug. 25, 2000 at 2 (footnote omitted).

The statement certainly did not respond to the offer made in the letter dated July 28, 2000, and no further conversations, oral or written, transpired on this subject until the instant Motion to Compel Production of Documents was filed.

Some information is known about each collection of boxes EPA Region 5 has shipped to NARA over the years, such as: the control or "accession number" associated with each shipment of boxes, the number of boxes in each shipment, and the general type of record contained in the box (are they connected to a superfund site, do they involve enforcement of some kind, is it related to state implementation plans, etc.). Id. at pars. 2 - 6. Other options may be available as well, especially if Defendant identified what it wanted by plant or company name. However, the present combination of overbroad Discovery Requests and the size of the document collection (or even any fraction of it) guarantees that the burden of searching these materials will far outweigh any speculative benefit Defendant may suggest.

4. Documents from Every Office of the United States Government, Including, its "Contractors and Consultants".

As set out above, Defendant's Request defines "Plaintiff," "Government" and "you" to include every office of the United States government, including its "consultants, contractors, or other persons acting on its behalf." Request at 1 (U.S. App. at Tab 21). The Request demands a search of every single office, from NASA to the Post Office to the Department of Agriculture – without any showing of benefit but with an inconceivably vast burden.

Defendant nonetheless declines to narrow the scope of its definition. The United States offered in writing to consider more targeted production requests aimed at some particular agency, but that suggestion was apparently insufficient:

> . . . [D]espite our stated objections to this request, we remain willing to discuss this matter further. Specifically, if IPC [Defendant] can identify either particular document it seeks from some particular agency or can specify a narrow, targeted request aimed at the document of a particular agency, we are willing to consider such requests.

July 28, 2000 letter from N. Veilleux to D. Joseph and P. Guterman at p. 7 (U.S. App. at Tab 23).[19] Instead, Defendant moves to compel and merely refers to the possible relevance of certain public documents generated by other Federal agencies (e.g., a published HUD regulation), available to anyone with access to the Code of Federal Regulations.

In light of the document production efforts already undertaken, it would impose a vast and unwarranted burden on the United States to require further execution of Defendant's Requests. Even apart from this burden, however, Defendant has failed to articulate how such wide-ranging material meets the discovery standard. Congress could not have been clearer in vesting EPA with authority over implementation of the Clean Air Act. Whether other federal agencies agreed with EPA, disagreed with EPA, or took no position on EPA's construction and implementation of the Act are matters irrelevant to this case. That is, nothing in this case warrants a search for documents in instrumentalities of the United States that are neither charged with implementing the Clean Air Act nor took any part in investigating, developing, and prosecuting the case brought against Defendant.[20]

Simply put, Defendant's Request is burdensome in the extreme, with no showing of relevance. Even if Defendant's could show some scant relevance from other agencies of

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[19]In an effort to identify any documents of other federal entities that may be responsive to Defendant's requests, the United States identified the coal-fired, steam electric generating units that are owned by federal agencies and may be subject to the same regulatory provisions at issue here. As Defendant acknowledges, the United States has offered to obtain documents pertaining to those federal facilities. Def.'s Mem at 19 n. 9. Defendant has not indicated an interest in such material.

[20] Defendant's passing reference to unspecified documents submitted to and generated by FERC and DOE, and a legislative staff report, in no way substantiate the relevance of the expanse of documents demanded by their requests.

government, the burdens of production so far outweigh any benefit that the discovery should be denied. See Linder v. Calero-Portocarrero, 183 F.R.D. 314, 319-20 (D.D.C. 1998). In that case, the court denied expanded discovery of several federal agencies because it was "unduly burdensome," concluding:

> The requested search also might well result in the retrieval of some relevant documents. In the process, however, a search as broad as that proposed by Plaintiffs would also generate mountains of irrelevant documents.

Id. The same result obtains here. In fact, it is clear that Defendant's Request goes far beyond the one denied by the Linder court, seeking documents from every federal agency and contractor, for an even broader set of issues. See also Hyundai Merchant Marine Co., Ltd. v. United States, 159 F.R.D. 424, 427 (S.D.N.Y. 1995) (denying discovery against the government on relevance and burden grounds).

5. Documents from EPA Offices That Have Nothing to do With the Clean Air Act.

Defendant demands that the United States search every office within EPA, including those that have no responsibility for administering or enforcing any aspect of the Clean Air Act. As an example of the relevance of such a search, Defendant cites "the Office of Water," providing only this as its rationale: "utilities are regulated extensively by other EPA program offices." Def.'s Mem. at 21. However, documents pertaining to water permitting, for example, are singularly irrelevant to any issue before this court in this Clean Air Act matter. The Complaint has nothing to do with the Clean Water Act, nor obviously to any statute other than the Clean Air Act. Defendant has all documents from offices involved in Clean Air Act policy formulation, permitting and enforcement. And again, as with each of these

categories on which further production is sought, the relevance of these materials is nil. Under the principle of Farley and using simple common sense as to where documents involving a claim under the Clean Act may be found, one would not look in EPA program offices involving the Clean Water Act, or disposal of hazardous waste, or other programs.

The burden of searching every other office in EPA for any document that might come within the scope of Defendant's very broad discovery requests is very significant and would involve review of millions more pages of paper. See B. Buckheit Declaration, at pars. 2 - 4 (U.S. App. at Tab 6).

Also, document tracking and measurement carried out by EPA Region 5 as part of document control unrelated to this case illustrate the burden of expanding Defendant's search even to all parts of just one Region or office (i.e., to include parts of a Region that do not work on the Clean Air Act). In taking inventory of records located at EPA Region 5 in many of its principle components, -- including some of the places Defendant wishes to be subject to document production here, like the Regional programs dealing with water and other "non-air" offices -- the Region identified *tens of thousands of feet* of documents of different types. See A. Rzeznik Declaration at pars. 8 - 12 & attachments C and D referenced therein (U.S. App. at Tab13). By any measure, the collection of documents is vast, for this one Region alone.

Another way to look at the burden of conducting document searches in the "non-air" components is to consider the size of some of those components. In Region V, for example, the Superfund Division employs about 276 people and has about 1,284 hazardous waste clean-up matters under way; consequently, the division creates and maintains a large amount

of documentation. This division carries out work under statutes relating to the clean-up of hazardous waste sites. It has no responsibilities for administering the Clean Air Act. Other Region V offices are similarly situated. See, e.g., Region V's Waste, Pesticides, and Toxics Division (J. Boyle Declaration, U.S. App. at Tab 4); K. Bremer Declaration, U.S. App. at Tab 5; and A. Restaino, U.S. App. at Tab 12); and the Region's Great Lakes Program Office (V. Thomas Declaration. U.S. App. at Tab 18). The burden of searching these offices greatly outweighs any speculative benefits therefrom.

Defendant has failed to show that the imposition of such an enormous burden, even for one EPA Region much less for all EPA Regions and offices, is necessary to enable Defendant to obtain materials that will be relevant and necessary to its defense in this action.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that Defendant's Motion to Compel Discovery filed September 29, 2000 be denied.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of October, 2000, I caused true and correct copies of the foregoing United States' Opposition to Defendant's Motion to Compel Discovery to be served upon the following counsel of record in this matter by messenger upon:

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-CV-833-DRH
	)	
ILLINOIS POWER COMPANY	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MOTION FOR LEAVE TO EXCEED PAGE LIMIT

The United States of America hereby respectfully moves the Court for leave to exceed the page limit imposed by LR 7.1(c) S.D. Illinois, and file a single twenty seven (27) page brief in support of the United States' Opposition to Defendant's Motion to Compel Discovery. In support of this Motion, Plaintiff states that this matter involves an important issue of law, and that Defendant has similarly moved the Court to enlarge page limits for its Memorandum in support of its Motion to Compel.

WHEREFORE, the United States respectfully requests that its unopposed Motion To Enlarge Page Limit be granted and that the Court enter the proposed Opposition that is filed with this Motion.

Respectfully submitted,

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Dated: 10/16/08

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CERTIFICATE OF SERVICE

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EXHIBIT B TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

CIVIL ACTION NO. 04-34 - KSF

UNITED STATES OF AMERICA

PLAINTIFF,

VS.

EAST KENTUCKY POWER COOPERATIVE, INC. DEFENDANT

* * * * * * * * * * *

PLAINTIFF UNITED STATES' RESPONSE TO DEFENDANT EAST KENTUCKY POWER COOPERATIVE, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 1 (LEGAL STANDARDS–DALE CLAIMS)

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MISCELLANEOUS

In its Summary Judgment Motion No. 1, Defendant East Kentucky Power Cooperative (EKPC) has moved for summary judgment on three issues: (1) the applicable legal standard for determining emissions increases under EPA's Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) regulations; (2) the applicable legal standard for determining whether activities qualify as "routine maintenance, repair and replacement;" and (3) whether the NSPS and PSD regulations apply to either "pollution control projects" or what EKPC calls "work done outside the boiler." The United States has likewise moved for summary judgment on the first two issues.[1] Because the United States has thoroughly addressed the pertinent legal standards in its briefs, the Government refers the Court to those briefs, and will attempt to confine this response to specific issues raised in EKPC's brief. The United States will then address EKPC's third argument, that the NSPS and PSD regulations do not apply to either "pollution control projects" or "work done outside the boiler."

PRELIMINARY STATEMENT

As defined in the Clean Air Act's NSPS and PSD provisions, a "modification" is any physical or operational "change" that will "increase" the amount of air pollution. 42 U.S.C. §§ 7411(a)(4), 7479(2)(C). The component terms "change" and "increase" in this definition are not themselves defined by the Act, and EPA has promulgated separate regulations interpreting these component terms differently in its NSPS and PSD modification regulations, to effectuate the different purposes of the two programs. Pursuant to the Act and these regulations, the United States has alleged that EKPC undertook capacity expansion projects at the Dale Plant that were

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[1] *See* United States' First Motion For Summary Judgment: The Applicable Legal Test for the Routine Maintenance, Repair, and Replacement Exclusion (Docket No. 61) and United States' Second Motion for Summary Judgment: The Applicable Legal Test For Determining Emissions Increases (Docket No. 56).

"modifications" of Dale Units 3 and 4 under the PSD program as well as the separate NSPS program, and that EKPC undertook a steam supply project at the Spurlock Plant that was a "modification" of Spurlock Unit 2 under the PSD program.

Thus, for purposes of this lawsuit, the Court must decide whether the activities described in the Government's complaint are modifications under the separate NSPS and PSD regulations. If the activities are modifications under the NSPS program, EKPC has violated the Clean Air Act and must comply with industry-wide performance standards that have been promulgated by EPA for all electric utility steam generating units. If the activities are modifications under the PSD program, then EKPC must apply for the appropriate PSD permits, perform comprehensive analyses and monitoring of the ambient air quality surrounding its plants, and operate in compliance with stringent emissions limits tailored specifically for its plants. Under PSD, such permits must incorporate emissions limits based on state-of-the-art pollution controls, known as the "best available control technology" (BACT).

There is little question that EKPC performed multi-million dollar capital improvement projects at its Dale and Spurlock Stations in the mid-1990s. *See* United States' Third Motion for Summary Judgment (Dale Unit 3) (Docket No. 65) and United States' Fourth Motion for Summary Judgment (Spurlock - Inland Steam Supply Project) (Docket No. 67). And, unlike most of the projects at issue in related cases filed by the Government against electric utilities for violating the Clean Air Act, a primary purpose of the upgrades that EKPC performed at the Dale plant was to increase the hourly megawatt generating capacity of the units. In other words, in addition to increasing the annual capacity of the Dale Units by allowing them to operate more on a yearly basis, EKPC also made the Dale units bigger, so that they could generate more steam

and electricity on an hourly basis as well – even more than they were originally designed to produce. Generating more steam and electricity generally means burning more coal, which means emitting more air pollution than before. As for the project at the Spurlock plant, the purpose of this project was to construct an entirely new steam line so that it could generate and sell *additional* steam to a neighboring manufacturer. Like the Dale projects, EKPC's Inland Steam Supply Project resulted in Spurlock Unit 2 producing *more* steam than it had ever produced before. In order to produce more steam, EKPC had to consume more energy in the form of coal at Spurlock Unit 2, and thus emitted more pollution.

EKPC is now attempting to evade liability for its illegal capacity and steam upgrades at Dale and Spurlock by advocating legal standards for emissions calculations that are clearly inconsistent with the plain language of EPA's regulations and EPA's historic interpretation of those regulations. Essentially, EKPC argues that even though Congress enacted completely separate NSPS and PSD programs under the Clean Air Act with different focuses and different purposes, EPA has, *and must*, promulgate regulations that apply identical tests to determine whether a physical or operational "change" results in an "increase" in air pollution under both these programs. EKPC thus argues that the emissions calculations for not just NSPS but also for PSD must be performed on the basis of an *hourly* rate rather than the total, *annual* emissions test consistently applied by EPA under the PSD regulations. But that is not what the regulations say, and it is not how EPA has historically interpreted the regulations. Nor does anything in the Clean Air Act itself mandate an hourly rate test for PSD.

EKPC nevertheless cites a recent decision by the Fourth Circuit as support for its argument that Congress mandated identical emissions tests under the NSPS and PSD

modification regulations. *See United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005). However, subsequent to the *Duke Energy* decision, the District of Columbia Court of Appeals, which has exclusive jurisdiction to review challenges to EPA regulations with nationwide impact such as the PSD regulations, issued a decision that undermines the Fourth Circuit's reasoning. *See New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). In that case, the D.C. Circuit recognized the differences between EPA's NSPS and PSD regulations, and upheld EPA's PSD regulations against industry challenges alleging that the regulations inappropriately differed from the NSPS regulations. *See New York*, 413 F.3d at 15-20. The position advocated by EKPC is contrary to the D.C. Circuit's decision upholding EPA's annual emissions-based PSD regulations.

More recently, another district court explicitly rejected the holding in *Duke Energy* and instead followed the reasoning of the D.C. Circuit. Ruling on exactly the same issue now before this Court, the Southern District of Indiana found that for NSPS purposes, EPA determines whether a source's hourly rate is expected to increase; but for PSD purposes, EPA correctly determines whether a source's *total annual* amount of emissions is expected to increase. *See United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272, 1276-77 (S.D. Ind. 2005).[2]

EKPC next seeks to avoid liability by claiming that its upgrades to increase capacity at the Dale plant were nothing more than "routine maintenance, repair and replacement."[3] This argument can only be made by asking the Court to accept a standard that "routine maintenance, repair and replacement" is *any* work, no matter how large, complex or costly, so long as it is

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[2] The Seventh Circuit has granted an interlocutory appeal on this holding. *See Order in United States v. Cinergy Corp.*, No. 199CV01693LJMVSS (7th Cir. 2006)(Ex. 1).

[3] EKPC apparently does not argue that the Inland Steam Supply Project was "routine maintenance, repair, or replacement."

prevalent in the industry, *i.e.*, "common in the industrial category as a whole." EKPC Memo No. 1, at 33. EKPC's argument glosses over the fact that the regulations only exempt *routine* maintenance, repair and replacement from the definition of "change:" work that is "a regular, customary, or standard undertaking for the purpose of *maintaining the plant in its present condition.*" September 9, 1988 Memo from Don Clay, Acting Assistant Administrator of EPA, to David Kee, EPA (Clay Memo) (Ex. 2 to Docket No. 61), at 3-4 (emphasis added).

EKPC even goes so far as to claim that its "common in the industry" standard was applied by *EPA* itself before it suddenly sued EKPC and other utilities, and that EPA has narrowed its definition of routine maintenance only to pursue these lawsuits. This claim is patently false. EPA's narrow interpretation of the routine maintenance exclusion dates back decades. Indeed, as will be demonstrated below, individual utilities and the utility industry as a whole, represented by the very law firm that now represents EKPC, complained more than 15 years ago that EPA was applying the routine maintenance exclusion narrowly and in such a fashion that projects like the ones at issue in this case would be considered physical changes.

ARGUMENT

I. EKPC's "Factual Background" Section.

Instead of a Statement of Uncontested Facts, Section III of EKPC's brief is called "Factual Background." However, this section is little more than thinly disguised argument and will be addressed as such. EKPC states that the Dale units and projects are discussed "to provide context for the discussion regarding the legal standards," but this statement is not quite on the mark. First, EKPC does not discuss the Spurlock project because EKPC apparently does not now claim that the Inland Steam Supply Project was "routine maintenance, repair and

replacement." Thus, there is no context provided for a routine maintenance discussion of the Spurlock project. Second, EKPC's discussion of the Dale units and projects in the "Factual Background" section are largely based on self-serving statements made by the company's own employees and hired experts *after* this litigation was commenced. These deserve scant attention. For example, in the heading for Factual Background Section III.C. of its brief, EKPC states: **"The Dale Projects Were Common Repair and Replacement of Components."** EKPC Memo. No. 1, at 20. Curiously though, nothing in the text of this section even vaguely supports this statement. EKPC merely cites generally to two reports of its hired expert, Jerry L. Golden.[4]

Not only are EKPC's conclusory assertions concerning the Dale projects unsupported by anything EKPC places in the record, but they are contradicted by statements from another utility asserting that the very same kinds of projects at issue here are not commonly performed by utilities and are indeed the kinds of projects that may trigger PSD review. For instance, the Dale projects involved the installation of oversized induced draft fans. *See, e.g.*, Memorandum in Support of United States' Third Motion for Summary Judgment, SOF ¶¶ 39-46 (Docket No. 65). In the enforcement action against Duke Energy, the company confirmed that installing larger fans would raise PSD concerns even under industry's expansive view of the routine maintenance exclusion:

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[4] Mr. Golden, who has no operational or maintenance experience with coal-burning power stations, in fact did perform a "survey" purportedly to show that certain boiler component replacements were common in the industry. However, the survey is of questionable value and is unlikely to be admissible even if EKPC were to attempt to rely on it: Mr. Golden obtained all of his information from Hunton & Williams, the law firm now representing EKPC, the data only came from five utilities that EPA had already determined violated PSD regulations by performing unpermitted "modifications" at their plants, and none of the components at issue in the present case (*i.e.*, burners, unit controls, coal feeders, turbine-generators, feedwater heaters or ID fans) were included in the survey. Transcript of testimony of Jerry L. Golden, *In re: Tennessee Valley Authority*, p. 659-670 (EPA E.A.B. 2000)(Ex. 2); Deposition of Jerry L. Golden, *United States v. American Electric Power Service Corp.*, Civil Action No. C2-99-1182 (December 14, 2004)(S.D. Ohio), p. 79-86 (Ex. 3).

> Duke had the option of putting in a bigger fan to produce more energy and use more coal. It decided not to do that, because that's the project that would've run afoul of the new source review modification requirements.

Transcript of Summary Judgment Hearing, *United States v. Duke Energy Corp.*, Civ. No. 00-1262 (M.D.N.C July 18, 2003), at 68-69 (Ex. 52 to Docket No. 65). This was confirmed in writing as well:

> [A] proposed ID fan replacement project . . . [was] not pursued by Duke precisely because Duke recognized that replacing fans to recover capacity long lost (not availability or reliability – namely to "recover now the summer megawatts lost due to installation of the hot precipitators in the 70s" . . . might be non-routine. As the quote to which EPA points in its memorandum shows, Duke interpreted *WEPCo* as finding the replacement of the steam drum and air heaters – which had limited the maximum capacity of the WEPCo units – non-routine. Such projects are not common in the industry.

Duke Energy's Brief in Opposition to Plaintiff-Intervenors' Motion for Partial Summary Judgment, March 31, 2003, *United States v. Duke Energy Corp.*, Civ. No. 00-1262 (M.D.N.C) (Ex. 57 to Docket No. 65), at 25 (citations and footnote omitted).[5]

II. The PSD Regulations Apply A Total Annual Emissions Rate Test.

EKPC argues that for purposes of determining whether a "modification" has occurred, the PSD regulations require EPA to demonstrate that the Dale projects would result in an increase in the *hourly* emissions rate from the Dale units, using what EKPC calls an "actual-to-actual" test. EKPC Memo No. 1, at 30-33. EKPC bases this argument on the fact that EPA's separate NSPS regulations focus on increases in hourly emissions, and contends that the CAA explicitly mandates the same regulatory emissions test under the PSD regulations as well. *See id.* at 31. Thus, according to EKPC, one cannot have a PSD modification without first having an

[5] It should be noted that the law firm of Hunton & Williams, which represented the company and made these arguments on behalf of Duke Energy, is now representing EKPC.

NSPS modification that results in an hourly rate increase. The United States has extensively addressed the applicable legal test for determining emissions increases under the PSD and NSPS programs in its own summary judgment briefing, and that discussion need not be repeated in its entirety here. *See* Memorandum in Support of United States' Second Motion for Summary Judgment: The Applicable Legal Test For Determining Emissions Increases (Docket No. 56), at 25-39. Instead, we will focus here on what EKPC completely ignores: (1) the plain language of the PSD regulations, (2) EPA's longstanding interpretation of those regulations, which has long been well understood by industry and others, and (3) the D.C. Circuit's recent decision upholding the differences between EPA's annual emissions-based PSD regulations and the hourly emissions-based NSPS regulations.

A. The Language of the Regulations Contradicts EKPC's Argument.

First, EKPC's preferred "hourly rate" interpretation of the PSD regulations is contrary to the plain language of the PSD regulations, which on their face require a comparison of total annual emissions before and after a project, not a comparison of maximum hourly emission rates. Specifically, the definitions of "net emissions increase" and "actual emissions" in the applicable PSD regulations require consideration of a source's actual annual "tons per year" emissions. *Compare* 40 C.F.R. § 51.166(b) (3), (21), (23) (1987) (actual annual emissions increases measured in tons per year) *with* 40 C.F.R. § 60.14(b) (maximum hourly emissions increases measured in kilograms per hour). This annual emissions test, which focuses on the actual total amount of pollution expected to be emitted from a source rather than its hourly rate, is consistent with the expressed purpose of PSD – to prevent the deterioration of actual ambient air quality as measured by the actual concentration of pollution in the air. *See* 42 U.S.C. §§ 7470(1),

7475(a)(3); *see also Northern Plains Res. Council v. EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981) (unlike NSPS, PSD "focuses on where the plant will be located and its potential effect on its environs"). Given the purpose of PSD and the plain language of EPA's regulations, EPA's interpretation, which holds that the PSD test focuses on increases in total actual *annual* emissions even if hourly emissions do not increase, is entitled to deference because it is neither "plainly erroneous" nor inconsistent with the plain text of the regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[9]

B. EPA's Historic Interpretation of The Regulations Contradicts EKPC's Argument.

Second, EKPC ignores the fact that EPA has long interpreted the PSD regulations as applying to increases in actual annual emissions, regardless of whether or not an increase in hourly emissions also occurs. Consistent with the ambient air quality focus of PSD, EPA explained as early as the preamble to the 1980 PSD regulations that the regulations focus on increases in total actual annual emissions, as measured in tons per year. *See* 45 Fed. Reg. 52676, 52698-99 (Aug. 7, 1980). EPA provided a lengthy example of how the definitions would work though a series of changes at a hypothetical source, as well as a series of examples of how emissions should be measured. *Id.* at 52704, 52711-12. Every one of those examples is

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[9] EKPC completely ignores the fact that the PSD regulations unambiguously refer to annual emissions increases, and instead focuses on an unrelated exclusion from the regulatory definition of a "change" in an attempt to support its hourly rate argument. EKPC Memo No. 1, at 33. However, the exclusion upon which EKPC relies merely holds that simple changes in hours of operation will not themselves be considered operational "changes." 40 C.F.R. § 51.166(b)(2)(iii)(f). By its plain terms, this exclusion addresses whether a project is considered a "change" in the first place, not how to measure emissions increases *from* a project that is itself determined to be a "change." *Id.*; *see Cinergy*, 384 F. Supp. 2d at 1278. Indeed, the exclusion is not even found in the definition of "net emissions increase" or "actual emissions," but rather in the definition of "change." In any case, even if this exclusion *could* be read as EKPC suggests, that reading has been repeatedly rejected by EPA in statements issued by EPA's Administrator as well as in the Federal Register. *See* U.S. Memorandum in Support of Second Motion for Summary Judgment (Docket No. 56), at 36-39.

addressed in terms of *tons per year*, not maximum hourly emission rates. None of them mentions the need to meet the NSPS "modification" test before making the PSD inquiry.[7]

EPA has further elaborated on the differences between the PSD and NSPS emissions tests in guidance issued since the 1980 preamble. For instance, EPA explained in 1990 that:

> The modification provisions of the NSPS and NSR programs grow from a single statutory trunk, the very broad definition of "modification" in section 111(a)(4). Under both respective programs, EPA developed a two-step test for determining whether activities at an existing facility constitute a modification subject to new source requirements. . . . In [the] second step, the applicable rules branch apart, reflecting the fundamental distinctions between the technology-based purposes of NSPS and the technology and air quality concerns of NSR. Briefly, the NSPS program is concerned with hourly emission rates, expressed in kilograms or pounds per hour. . . . Emissions increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum capacity. The NSR is concerned with total annual emissions to the atmosphere, expressed in tons per year. (Annual emissions are the product of the hourly emissions rate, which is the sole concern of NSPS, times the utilization rate, expressed as hours of operation

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[7] Indeed, EPA explained even before the 1980 PSD regulations that the NSPS and PSD regulations had vital differences, and that the NSPS definition of "modification" could differ from the PSD definition of "modification." *See* 43 Fed. Reg. 26388, 26394 (June 19, 1978) ("Since the PSD program is ultimately concerned with effects on air quality, EPA does not feel bound to apply mechanically the pre-ASARCO case definition of 'modification' in section 111, a section directed toward technology, so to frustrate the air quality protection purpose of PSD."). EKPC ignores EPA's preamble statements and instead cites to the paid "expert" testimony of Walter Barber, a former EPA official who states that EPA intended the NSPS and PSD regulations to have the "same meaning." EKPC Memo No. 1, at 10. Mr. Barber's testimony deserves no consideration because it is irrelevant, unreliable, and fails to meet the standards for expert testimony set out in Federal Rule of Evidence 702. *See United States v. Southern Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31437523, at *7-8 (S.D. Ind. Oct. 24, 2002) (excluding Mr. Barber's report and testimony because it was "essentially being offered to explain the law to the Court") (Ex. 4); *United States v. Ohio Edison Co.*, No. 2:99-CV-1181, 2003 WL 723269 (S.D. Ohio Feb. 25, 2003) (excluding Mr. Schweers' testimony as "improperly invad[ing] the province of the Court to determine the applicable law," and observing that Mr. Barber would have offered similar testimony had defendant not withdrawn him as a witness). EKPC relies on Mr. Barber to tell the Court what EPA's regulations mean, and long-standing Sixth Circuit case law confirms that it is appropriate to strike such "ultimate issue" testimony. *See Woods v. Lecureux*, 110 F.3d 1215, 1220 (6th Cir. 1997); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985); *Stoler v. Penn. Centr. Transp. Co.*, 583 F.2d 896, 899 (6th Cir. 1978); *see also United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 223 n.5 (4th Cir. 1997) (rejecting testimony of former regulator about the meaning of regulations because such testimony lacks a strong indicia of reliability). Mr. Barber's opinion will simpy not assist the Court in determining what the law means. Indeed, Mr. Barber candidly admits that EPA's intent in promulgating the NSR regulations is fully captured in the administrative record and other public documents. *See* Deposition of Walter Barber, *United States v. American Electric Power Service Corp.*, Civil Action No. C2-99-1182, January 6, 2005, at 28-30 (Ex. 5); EKPC Ex. 23, at 6-7; Deposition of Walter Barber, October 24, 2005, at 27-29; 64-65 (Ex. 6).

> per year). Emissions increases under NSR are determined by changes in annual emissions to the atmosphere.

January 30, 1990 Letter from David Kee, EPA, to Timothy Method, Indiana Dept. of Envtl. Management (Ex. 15 to Docket No. 56), at 4; *see also* February 15, 1989 Letter from Don Clay, EPA, to John Boston, WEPCo (Ex. 4 to Docket No. 56), at 9 (explaining that PSD emissions increase can come from increase in hourly production rate or increases in hours of operation).

Similarly, in guidance issued following the Seventh Circuit's decision in *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), EPA explained that the "actual-to-actual" test under the 1980 regulations requires consideration of *both* annual hours of operation *and* hourly emissions rates. *See* June 8, 1990 Letter from William Rosenberg, EPA, to John Boston, WEPCo (WEPCo Remand Determination) (Ex. 5 to Docket No. 56), at 1, 7-8 (rejecting the same test proffered by EKPC as "not fairly discernible from any reading of the [1980] regulations").[9] EPA soon thereafter published a notice in the Federal Register confirming that this "actual-to-actual" emissions test under the 1980 PSD regulations is the only alternative to the more stringent "actual-to-potential" test for PSD. *See* 56 Fed. Reg. 27630, 27633 and n.10 (June 14,

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[9] EKPC claims that EPA's refusal to apply an hourly rate test violated the Seventh Circuit's remand instructions, and was done with "no reference to the regulatory language." EKPC Memo No. 1, at 13. That is not true. The Seventh Circuit was troubled not by EPA's reliance on increased hours of operation to predict emissions increases resulting from the WEPCo project, but rather by "EPA's assumption of continuous operations" where a more realistic prediction of future operations was possible. *WEPCo*, 893 F.2d at 917-18. EPA addressed this concern by applying a more realistic projection of future actual annual emissions that did not simply assume year-round, round-the-clock operation. As EPA specifically explained, "The Agency believes that the court's principal instruction . . . can be reasonably accommodated *within the present regulatory framework*." WEPCo Remand Determination, at 1 (emphasis added). In any event, even to the extent *WEPCo* could be read as a basis for EKPC's interpretation of the regulations, EPA clearly considered and rejected that interpretation of the regulations on remand, and it is this interpretation that is entitled to deference from this Court, not EKPC's interpretation or even the (alleged) interpretation of the Seventh Circuit.

1991).[9] The Administration also explained that PSD can be triggered by changes that do *not* increase hourly rates in testimony before Congress:

> Some refurbishment projects may in fact lead to an increase in maximum hourly emissions . . . . However, those projects that did not increase maximum hourly emissions would be subject . . . to the PSD provisions.

See 1990 CAA Leg. Hist., at 10738, 10742 (statement of Richard Schmalensee, President's Council of Economic Advisers) (Ex. 7); *see also id.* at 10747 (explaining that an hourly emissions test for PSD would be a significant departure from existing law).

EPA has continued to apply this same interpretation in regulations promulgated in 1992 and 2002, which similarly apply PSD to changes that increase actual annual emissions, regardless of whether or not hourly emissions increase. *See* 57 Fed. Reg. 32314, 32316, 32323 (July 21, 1992); *New York*, 413 F.3d at 15-18. These rulemakings do not imply, as EKPC incorrectly asserts (EKPC Memo No. 1, at 13, 31-32), that the regulations previously did not allow the consideration of increased hours of operation when projecting emissions increases. Rather, the rulemaking made explicit what was already a common-sense reading of the 1980 regulations, as explained by EPA on remand from the Seventh Circuit's *WEPCo* decision and in the preamble to the 1992 rules. *See* WEPCo Remand Determination, at 6-8; 57 Fed. Reg. at 32,316-17 & n.10, 32,323. Indeed, in the preamble to the underlying rulemaking proposal, EPA confirmed that the test applied in the WEPCo Remand Determination – the very test EPA seeks to apply here – would *continue* to apply under the 1980 regulations. *See* 56 Fed. Reg. at 27633.

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[9] EKPC's use of the term "actual-to-actual" to define its own hourly rate test is particularly ironic given that EPA used this very same term for the test EKPC here opposes: EPA used the "actual to actual" moniker in its 1990 WEPCO Remand Determination and 1991 federal register notice, both of which confirmed that hourly rate increases are not a prerequisite under the annual emissions test set forth in the 1980 PSD regulations. *See* WEPCO Remand Determination, at 6-8; 56 Fed. Reg. at 27633.

Not surprisingly then, the Kentucky Division for Air Quality (KDAQ) has also always interpreted PSD to apply to increase in tons per year of emissions, even if hourly emissions do not increase. *See, e.g.*, Deposition of James W. Dills, November 10, 2005, at 65-66 (Ex. 8); Deposition of Roger Cook, July 27, 2005, at 95 (Ex. 9).[10/]

Indeed, prior to the *Duke Energy* case upon which EKPC so heavily relies, there was little dispute in the caselaw or elsewhere that for PSD purposes, emissions calculations were done on the basis of a source's total, annual emissions.[11/] As the court recognized in *Ohio Edison*, utility sources and industry lawyers were well aware that PSD applicability was determined by quantifying emissions increases on a *tons per year* basis. *Ohio Edison,* 276 F. Supp. 2d at 875-76. In fact, industry lawyers were not only aware of this standard but advised utilities of it and discussed it openly with EPA. For instance, in a memo to the National Rural Electric Cooperative Association, industry lawyers (in fact, the very law firm now representing EKPC) praised EPA's 1991 Federal Register notice discussing the *annual* tons-per-year "actual-

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[10/] EKPC ignores EPA's long-standing interpretation and instead attempts to divine an hourly rate test from two 1981 statements by Edward Reich. We anticipated and addressed this attempt in our own Second Motion for Summary Judgment on the Applicable Legal Test for Determining Emissions Increases. First, Mr. Reich's statements deal with the separate hours of operation exclusion under the PSD regulations and did not cite to the provisions of EPA's regulations defining emissions increases. Second, EKPC's reading of Mr. Reich's statements conflicts with the clear regulatory text and preamble, which an EPA employee can not change. Third, EKPC's reading of Mr. Reich's statements has been consistently and authoritatively rejected by EPA in official guidance, statements issued by the EPA Administrator, and formal notices in the Federal Register. *See* U.S. Brief in Support of Second Motion for Summary Judgment (Docket No. 56), at 36-39.

[11/] *See WEPCo*, 893 F.2d at 904-05, 915 ("Unlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year."); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 293-94, 297-98 (1st Cir. 1989) (holding that PSD can apply if physical change leads to increase in total annual emissions even where hourly rate of emissions would decrease); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 875-76 (S.D. Ohio 2003) (contrasting NSPS and PSD and rejecting hourly rate test for PSD); *United States v. Southern Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 998 (S.D. Ind. 2003) ("For the PSD program, on the other hand, the EPA regulations provide that an increase in the *total amount of annual emissions* activates the modifications provisions."); *see also New York*, 413 F.3d at 14-15, 18-20 (illustrating the historic and practical difference between the PSD actual annual emissions test and the NSPS hourly rate test, before rejecting industry's argument that such differences were unlawful).

to-actual" test that had been applied in the WEPCo Remand Determination – again, the same interpretation EPA seeks to apply here – as a "clarification" of EPA's existing PSD emissions test under the 1980 regulations that was consistent with EPA's prior practice. *See* July 18, 1991 Memo from Edison Electric Institute re: Proposed Rule Related to WEPCo and Enclosure (Ex. 10), at 4, 6. The utility industry made similar statements to EPA in the comment period following EPA's proposal of the WEPCo rule. *See* Statement of Henry V. Nickel, Hunton & Williams, on behalf of the Utility Air Regulatory Group, (Ex. 11), at 4 ("EPA's notice constitutes a welcome return by the agency to the correct view of the law.").

C. EKPC's Reliance on *Duke Energy* Is Misplaced.

Finally, EKPC ignores the ramifications of a recent D.C. Circuit opinion upholding EPA's annual emissions-based PSD regulations. In the *Duke Energy* case cited by EKPC, there was one key holding which provided the foundation for finding an hourly emission rate test for the PSD program: the Fourth Circuit held that once Congress incorporated the statutory definition of "modification" from the NSPS program into the PSD provisions of the Clean Air Act, EPA could not interpret the definitions differently in the separate regulations promulgated under the two programs. *Duke Energy*, 411 F.3d at 546-47.[12] The *Duke Energy* court held that by cross-referencing the pre-existing statutory definition of "modification" when it enacted the

[12] Specifically, the *Duke Energy* decision rested on the court's reading of a statutory cross-reference between the separate NSPS and PSD provisions of the Clean Air Act. Congress first defined "modification" when it enacted the NSPS program as part of the 1970 Clean Air Act. *See* 42 U.S.C. § 7411(a)(4). Seven years later, Congress added the PSD program in a different part of the statute as part of the 1977 Clean Air Act Amendments. Rather than simply repeat the definitional words in the PSD provisions, Congress cross-referenced the pre-existing definition of modification. The PSD portion of the statute thus provides that "construction" includes "the modification (as defined in section 7411(a) of this title) of any source or facility." 42 U.S.C. § 7479(2)(C).

separate PSD provisions in 1977, Congress created an "irrebuttable" presumption that it intended identical "modification" regulations under the PSD and NSPS programs. *Id.* at 550.

However, nine days after the Fourth Circuit ruled in *Duke Energy*, the D.C. Circuit issued an opinion on consolidated challenges to EPA's 1980, 1992, and 2002 PSD rules that undermines the basis for the Fourth Circuit's holding. Whereas the Fourth Circuit held that Congress's decision to cross-reference the statutory definition of "modification" created an "irrebuttable" presumption that Congress intended identical emissions increase tests in the PSD and NSPS regulations, the D.C. Circuit held that the very same cross-reference was the mere equivalent of "having simply repeated" in the PSD context "the definitional language used before in the NSPS context," telling us "no more than if Congress had used a little more ink and repeated the NSPS definitions verbatim." *New York*, 413 F.3d at 19. While the D.C. Circuit declined to comment directly on the Fourth Circuit's holding, *New York* quite obviously undermines the foundation of the Fourth Circuit's rationale and confirms that the cross-reference does not mandate a particular test for an emissions increase under PSD regulations. Instead, the D.C. Circuit confirmed that Congress simply chose to use the same *statutory* definition of modification for both PSD and NSPS. *See id.* The D.C. Circuit went on to hold that nothing in the statutory language or history of the Clean Air Act suggested that in enacting the 1977 CAA Amendments, Congress intended to incorporate the NSPS regulatory definition of "modification" into the PSD regulations. *New York*, 413 F.3d 3 at 19-20.

Given this guidance from the D.C. Circuit – that Congress simply chose to use the same *statutory* definition of modification of NSPS and PSD purposes – the question whether the regulatory provisions defining components of the statutory term "modification" (such as

emissions "increase") must be the same under NSPS and PSD is controlled by a long-standing line of Supreme Court cases. These precedents establish that identical statutory language need *not* be construed the same way if the purposes of the statute or legislative history suggest that differing constructions are appropriate. *See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595, 597 (2004).[13] The Fourth Circuit thus erred in finding an "irrebuttable" presumption from Congress's use of identical statutory definitions of "modification" in the NSPS and PSD programs. Indeed, the Supreme Court has compared the unwarranted tenacity of such irrebuttable presumptions of identical meaning to "original sin." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (citation omitted). As repeatedly explained by EPA in regulatory preambles and other guidance, the different PSD and NSPS emissions tests reflect the fundament differences between the two programs. *See supra* Section II.B.

Evaluating the state of law following the decisions of the Fourth and D.C. Circuits, the district court in a parallel enforcement case expressly rejected the holding in *Duke Energy* and held that the PSD rules apply when a source has an increase in total annual emissions. *See Cinergy*, 384 F. Supp. 2d at 1275-77. The *Cinergy* court held that a source must estimate post-project emissions before construction begins. *Id.* at 1276. This actual-to-actual comparison is measured using the projected actual operating hours and projected actual production rates that would result from a proposed modification:

> This Court begins by following the line of analysis the District of Columbia Circuit used in *New York*. When Congress altered the definition of "construction" to include "modification" under PSD as it is used for NSPS, it did not, expressly or otherwise,

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[13] *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 343, 346 (1997); *District of Columbia v. Carter*, 409 U.S. 418, 421-22, 432 (1973); *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 86-88 (1934); *Atlantic Dry Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

> incorporate the regulatory definition. Nothing in the Congressional history indicates Congress intended to incorporate the regulatory definition.
>
> Further, Congress did not limit the EPA's authority to further define "modification" in the regulations as it deemed fit to serve the purposes of the PSD program. . . . Nor did Congress direct the EPA to change its regulatory definition, which differed from the NSPS regulatory definition at the time Congress promulgated NSR in 1977. . . . Finally, nothing about the EPA's definition of "modification" contradicts the statutory definition.

Id. at 1276 (citations omitted).[14] The *Cinergy* court went on:

> The Court disagrees with both Cinergy and the *Duke Energy* court that the EPA's definition of "actual emissions," means that "a net emissions increase can result only from an increase in the hourly rate of emissions." Consistent with the 1980 rule defining "actual emission," in an actual-to-projected-actual comparison, the projected actual emissions would be measured using projected actual operating hours and projected actual production rates. Thus, if a physical change will result in a unit increasing its operating hours, the projected actual operating hours would include the increase.

Id. at 1277 (citation omitted).[15]

Based on its thorough analysis of these appellate decisions, the *Cinergy* court properly concluded, the *Duke Energy* decision was wrongly decided in light of the D.C. Circuit's holding in *New York*. Because the D.C. Circuit has exclusive jurisdiction to review regulations such as EPA's 1980 rules,[16] this Court should follow the analysis of the D.C. Circuit in *New York* and

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[14] This holding was also consistent with established caselaw specifically confirming that EPA may define component terms of the definition of "modification," including the component term "increase," differently under the NSPS and PSD regulations. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 400-02 (D.C. Cir. 1979) (recognizing that the term "increase" in the statutory definition of "modification" can be interpreted differently for PSD and NSPS purposes); *see also id.* at 396-98 (EPA retains discretion to define "component terms" of the statutory definition of "source" differently for PSD and NSPS purposes, even though Congress "indirectly incorporated" the pre-existing NSPS statutory definition of "source" into the PSD provisions of the Act).

[15] The district court of the Northern District of Alabama, in an action brought by citizens' groups against the Tennessee Valley Authority (TVA), has reached a contrary conclusion, though with scant analysis, and based on the mistaken premises that (1) the D.C. Circuit had before it in *New York* no challenge to the 1980 PSD regulations, and (2) the D.C. Circuit's opinion did not at all address whether Congress required EPA to employ an hourly rate emissions test in its PSD regulations. *See Nat'l Parks Conserv. Ass'n v. TVA*, Civ. No. 01-403-VEH (N.D. Ala.) Sept. 7 2005, slip op. at 9-10; Nov. 29, 2005 slip op. at 17-18; Jan. 17, 2006 slip op. at 11-12 (Ex. 12).

[16] *See* 42 U.S.C. § 7607(b).

the subsequent *Cinergy* decision, and hold that for PSD purposes, there is no requirement that emissions increases must be calculated using an hourly rate test. Instead, this Court should confirm that the applicable PSD regulations employ an actual annual emissions test using projected actual operating hours and projected actual production rates.

III. The Applicable Routine Maintenance Exclusion Is Narrowly Applied To Arrive At A Common Sense Understanding.

The United States has also fully briefed the appropriate standard for the "routine maintenance, repair and replacement" exclusion in its Memorandum in Support of Its First Motion for Summary Judgment. *See* Docket No. 61. That discussion will not be repeated here. Rather, the Government will respond to the specific issues raised by EKPC in its brief.

A. EPA and the Electric Utility Industry Have Never Treated Life Extension Projects as Per Se Routine Maintenance Projects.

EKPC apparently concedes that its Dale projects were "life extension" projects designed to extend the service lives of Dale Units 3 and 4 beyond their normal operating lives of 35 to 40 years.[17] *See* EKPC Memo No. 1, at 22. EKPC instead argues that the fact that EPA conducted inspections of many electricity generating plants during life extension projects somehow means that EPA's interpretation of routine maintenance turned on whether the projects were common in the industry. EKPC Memo No. 1, at 34-35. While this generalization does not follow, EKPC is at least correct on one point: EPA has long recognized that projects that enhance capacity or extend the useful life of a plant are unlikely to be considered routine maintenance, repair and

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[17] "Life extension" is a term coined by the electric utility industry in the 1980s. *See, e.g., STEAM: Its Generation and Use*, Babcock & Wilcox (40th ed. 1992), at 46-1 (Ex. 13). According to this authoritative text by a leading boiler manufacturer, prior to the 1980s, it was common to retire coal-fired steam electric generating units after 35 to 40 years of service. "Life extension" is defined by Babcock & Wilcox as "a strategy that delays the plant retirement while maintaining acceptable availability." *Id.*

replacement.[18] Perhaps just as significant is that the *electric utility industry* and its suppliers did not consider life extension work to be "routine" or "normal" maintenance at the time they were planning and promoting such work in the industry.[19]

However, not every life extension project is a "modification" under the Clean Air Act. While the fact that the purpose of a project is to extend a unit's life is obviously very significant to EPA's analysis, a life extension project, like any project, must be analyzed under EPA's multi-factor, common sense test for routine maintenance. Moreover, merely having knowledge of a life extension project – even a massive one that may be clearly non-routine – does not provide sufficient evidence to establish that a violation has occurred. As stated earlier, a

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[18] *See* November 22, 1989 Letter from Charles Whitmore, EPA Region VII, to Roger Randolph (Ex. 14), p. 1-2 ("Projects that will significantly enhance the present efficiency or capacity of the plant/unit and that will substantially extend the useful economic life of the plant/unit generally should not be considered routine maintenance, repair, or replacement. A common sense approach is suggested."); December 16, 1991 Letter from Thomas Maslany, EPA Region III, to William Riley, (Ex. 15), p. 1 ("EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as any other relevant factors. Typically, EPA will consider such factors as whether (1) the repair/replacement is immediate after discovery of deterioration; (2) the replaced equipment is standard in the industry and is replaced frequently; (3) the repair/replacement is expensive; and (4) the repair/replacement appreciably prolongs the life of the facility.)

[19] Ex. 13, at 46-1 ("Older boilers represent important resources in meeting energy production needs. A strategic approach is required to optimize and extend the life of these units. Initially, routine maintenance is sufficient to maintain high availability. However, as the unit matures and components wear, more significant steps become necessary to extend equipment life."); *A Strategy for Fossil Power Plant Life Extension*, A.F. Armor, J.R. Scheibel, R.B. Dooley, J.B. Parks [EPRI document presented to April 1985 American Power Conference](Ex. 16), at 3, 5 ("Life extension requires infusions of money over a long period. . . . Clearly this implies a decision and commitment by utility higher management and differentiates 'life extension' from routine plant maintenance and availability enhancement. . . . With normal maintenance practices alone, reasonable availabilities will be difficult to obtain in aging equipment."); *Electric Generating Plant Life Extension*, Robert L. Carelock (Ex. 17), at EP013208 (Life extension "augments" routine maintenance); *Life Extension: A Glorified Maintenance Program?*, J.A. Derdiger, R.J. Hollmeier, G. Shibayama, Fluor Engineers, Inc. (Ex. 18), at EP013396 ("Normal maintenance focuses on corrective and preventative activities, which tend to support continued operation of components and subcomponents. Life extension programs on the other hand, focus primarily on predictive activities which ensure safe, reliable unit operation."); *Life Evaluation Techniques for Steam Turbine-Generators*, Deborah A. Davis and A.S. Dayal, Westinghouse Electric Corporation (Ex. 19), at EP013433-013434 ("The prerequisite for defining a life evaluation process is a clear distinction between life extension and normal maintenance. Good maintenance programs are essential to assure reliable life extension; however they cannot ensure that critical components will not fail due to age-related phenomenon. For example, normal maintenance action does not assess the amount of material degradation in high temperature components, nor does it estimate cumulative fatigue damage due to cycling. Life extension is proactive and addresses the estimation of remaining life as a function of principal failure mechanisms.").

"modification" under the Clean Air Act is a physical or operational change that will result in an increase in air pollution. 42 U.S.C. § 7411(a)(4). Thus, a "modification" under the Act involves not only a non-routine physical change but also an expected emissions increase to establish that a violation has occurred. *New York*, 413 F.3d at 11; *WEPCo*, 893 F.2d at 907; May 23, 2000 Letter from Francis Lyons, EPA Region V, to Henry Nickel, Hunton & Williams ("Detroit Edison Determination") (Ex. 17 to Docket No. 61), at 2. The simple fact that a life extension project occurs at an existing unit does *not* mean that such a project automatically is a "modification" under the Clean Air Act. As both EPA and the electric utility industry will agree, even for a non-routine project, demonstrating an emissions increase involves a calculation using data that must be collected from the utility company. *See* WEPCo Remand Determination (Ex. 5 to Docket No. 56), at 6-10.[20/] Thus, no generalizations concerning EPA's interpretation of the routine maintenance exclusion can be made based on alleged knowledge of life extension projects.[21/]

[20/] Even under the more stringent "actual-to-potential" test there are a number of ways that a source undergoing even a non-routine life extension project can avoid triggering PSD by ensuring that total annual emissions do not increase as a result of a project. These include, for example, limiting or decreasing the hours of operation of the unit after the project -- in the words of a Hunton & Williams memo, "accepting a 'cap' on its current operations. . . ." January 19, 1990 Hunton & Williams Memo (Ex. 7 to Docket No. 71), p. 3.

[21/] Indeed, in one of the very documents cited by EKPC to support its argument urging such a generalization, EPA's Administrator specifically explained that the mere fact that other life extension projects may be occurring did not mean that PSD would always be triggered:

> First, the life extension may involve no nonroutine physical or operational change. . . . Even if the life extension did involve nonroutine changes, it still would not trigger new source requirements if it did not increase pollution on an hourly basis (for NSPS purposes) or an annual basis (for PSD and nonattainment new source review purposes. . . . In addition, . . . due to EPA's netting rules, the owner of an existing source almost always has the choice of merely avoiding increases in emissions at existing plants.

EKPC Ex. 41, at 5-6.

Nor would a failure to enforce a regulation establish that the underlying conduct was legal. *See Fluor Daniel v. Occupational Safety and Health Review Comm'n*, 295 F.3d 1232, 1238 (11th Cir. 2002) (finding that without the government's "affirmative approval" of the conduct at issue, the defendant could not have been lulled into believing that its conduct was lawful and finding that the government's silence on whether the regulation applied "cannot be construed as a sign of approval"); *see also Nat'l Parks Conserv. Ass'n, supra*, Nov. 29, 2005 slip op. (Ex. 12), at 19 n.12 (rejecting relevance of TVA's suggestion that plaintiffs and regulators were contemporaneously aware of alleged modification yet failed to act: "A lack of enforcement does not make legal what is illegal.").

In addition, as with most governmental agencies that administer and enforce the law, EPA does not have the resources to catch and prosecute every violator of every regulation it is charged with implementing and enforcing. Accordingly, as with all law enforcement agencies, EPA makes enforcement choices based upon the time, information and resources available to it. For all these reasons, the failure to take an enforcement action, or even the failure to find that a violation of the law has occurred, cannot be construed as evidence of the Agency's interpretation.

B. EPA's Statements to Representative Dingell and GAO Do Not Support EKPC's Argument that the Standard is "Common in the Industry."

EKPC next argues that statements made to Representative Dingell and allegedly made to the General Accounting Office (GAO) support its "common in the industry" argument. EKPC Memo. No. 1, at 25-26, 34.[22/] Specifically, EKPC cites a 1990 report of the GAO and letters

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[22/] The United States objects to the admissibility of the GAO report as hearsay. The internal hearsay contained within the GAO report is inadmissible under the public records exception to the hearsay rule. Even where predicates

from EPA officials to Congressman Dingell that predicted that the WEPCO ruling would not be broadly applied. EKPC Memo No. 1, at 25. However, nothing in these documents ever discusses the scope of the routine maintenance exclusion, let alone hints that EPA was changing the analysis set forth in the Clay Memo, and it is not reasonable to infer from these statements that EPA assumed that any power plant refurbishment project would be exempt solely because it was prevalent in the industry. Instead, the statements relied on by EKPC are simply factual predictions that most life extension projects would not be like WEPCo's projects.

As the *SIGECO* court stated when faced with the same citation to the GAO report:

> This language says little, if anything at all, about the EPA's interpretation of routine maintenance. It was obvious to both the EPA and the regulated community that Wisconsin Electric's project was massive and unprecedented rather than typical and commonplace. The report cites two reasons the WEPCO ruling would not be applied broadly: (1) because many projects do not result in increased emissions; and (2) because other projects qualify for routine maintenance. The letter does not construe the routine maintenance exemption; it simply reaffirms WEPCO and explains why the EPA did not think it would not affect most utilities. Moreover, as the Government argues, even if it did, it is an anonymous statement that does not purport to give the EPA's official view.

United States v. Southern Indiana Gas & Elec. Co. (SIGECO I), 245 F. Supp. 2d 994, 1020 (S.D. Ind. 2003). If anything, numerous statements in the GAO report are consistent with the interpretation EPA has applied to the applicable routine maintenance exclusion. For instance, the section of the report addressing life extension includes the statement that "life extension projects involve physical or operational changes to power plants that potentially can invoke

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for the Rule 803(8)(C) exception are present, public investigative reports may still be excluded where "the sources of information or other circumstances indicate lack of trustworthiness." The sources of the information (the unnamed EPA officials) have never been determined, despite extensive efforts in discovery. Moreover, the statements in the GAO report are unclear as to whether the subject of the discussion or basis for the ostensible opinion was, *e.g.*, the routine maintenance exclusion or emissions increases. Thus, there is simply not a sufficient guarantee of reliability or trustworthiness to admit the internal hearsay in the GAO report.

either the modification or reconstruction provisions and thus trigger the NSPS and the PSD program provisions." GAO Report at 28 (EKPC. Ex. 39). The report also distinguishes between projects aimed at *restoring* generating capacity of deteriorated facilities, that are generally non-routine, and those aimed at merely *preventing* plant deterioration, that are often routine. *Id.* at 30. Moreover, as the United States has alleged in this case, EKPC's projects went beyond even *restoring* generating capacity – they added *new* capacity.

EKPC also reads too much into statements contained in letters from EPA officials to Congressman Dingell. For instance, though an EPA official indicated in a 1990 letter that EPA's determination in WEPCo "is not expected to significantly affect power plant life extension projects" (EKPC Memo No. 1, at 26), that was because "EPA believes that most utilities conduct an ongoing maintenance program at existing plants which prevents deterioration of production capacity and utilization levels" and thus EPA anticipated that most of these projects would not entail "nonroutine replacement that would result in an actual emissions increase." EKPC Ex. 41, at 5. The statement said nothing about projects, such as EKPC's, that restored and in fact *increased* capacity. Similarly, Administrator Reilly reported in a 1989 letter that an initial survey "did not result in the detection of any violations." EKPC Ex. 80. However, the simple fact that EPA had identified other "life extension" projects and had not yet identified them as violations *does not* establish that EPA was applying a common in the industry standard. In fact, EKPC can proffer no basis for this conclusion. Perhaps Mr. Reilly anticipated that other projects would be factually distinguishable or would not increase emissions, or perhaps he was simply wrong in predicting that the *WEPCo* ruling would not have a broad effect. In any event, neither

the GAO report nor the letters to Congressman Dingell do anything to change the Clay Memo's authoritative interpretation of the "routine maintenance" exclusion.

C. The NSPS Regulations and the WEPCo Preamble Do Not Support EKPC's Argument that the Standard is "Common in the Industry."

EKPC also takes snippets of language from two sources and contends that they demonstrate that "EPA's long-standing interpretation" of the routine maintenance, repair or replacement exclusion.. EKPC Memo. No. 1, at 34. An examination of the full language of the referenced documents demonstrates that EPA has long interpreted the applicable "routine maintenance, repair or replacement exclusion" to examine whether a project is performed more than once or twice in the life of a unit, rather than whether a project is common in the industry.

First, EKPC claims that the NSPS regulations, which reference "routine for a source category," evidence EPA's agreement with EKPC's "common in the industry" test.[23] To the contrary, as the *SIGECO* court found, in the Clay Memo

> the EPA notified WEPCO and the regulated community that one of the "most important factors" that led it to conclude the WEPCO project was not routine was the fact that the project "would normally occur only once or twice during a unit's expected life cycle" and that WEPCO had never replaced a steam drum at any of its facilities.

SIGECO I, 245 F. Supp. 2d at 1018. EPA made this determination pursuant to both the NSR and NSPS regulations, which contained the language upon which EKPC relies. Accordingly, by

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[23] The use of the term "source category" in the NSPS regulations but not the PSD regulations simply reflects the structure of the NSPS program, which provides overall standards of performance for entire industrial "source categories."

upholding EPA's determination in *WEPCo*, the Seventh Circuit clearly rejected this argument more than 15 years ago.[24/]

Similarly, EKPC seizes on the following excerpt from the preamble to the 1992 regulations as claiming that it supports its common in the industry standard (EKPC Memo. No. 1, at 34):

> [W]hether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.

57 Fed. Reg. at 32326.

This sentence is perfectly consistent with EPA's interpretation of the exclusion. As our own summary judgment brief on the applicable test for routine maintenance explains, it does not abrogate the Clay Memo but rather confirms that one should consider whether an activity is routine in the context of the relevant "industrial category" – that is, the particular industry at issue. *See* U.S. Memorandum in Support of First Motion for Summary Judgment, at 33-34 (Docket No. 61). Two courts have thus explicitly rejected EKPC's argument:

> The only insight that this routine maintenance clarification provides about the frequency factor is contained in the last five words of the paragraph: "within the relevant industrial category." "Relevant industrial category" presumably refers to the utility industry in this case, and informs a utility company that whether or not

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[24/] EKPC makes a similar argument that EPA's "new interpretation" of the routine maintenance provision is inconsistent with Congressional intent and the intent of the regulations. *See* EKPC Memo No. 1, at 36-37. EKPC's argument is that the original NSPS rules established a "common in the industry" test for routine maintenance, which was incorporated by Congress into the NSR programs. *Id.* However, while EPA has indeed applied the routine maintenance exclusion the same way under NSPS and NSR rules, EPA has historically applied the routine maintenance exclusion narrowly in both the NSPS and the NSR regulations as recognized by the Seventh Circuit in *WEPCO*. Moreover, even if EPA had applied such a test for routine maintenance under NSPS, it was not mandated by Congress for PSD. In *New York*, the D.C. Circuit rejected the parallel contention regarding the interpretation of "emissions increase" – that Congress had somehow incorporated an NSPS regulatory definition of that term when it cross-referenced the NSPS statutory definition of "modification" in the PSD statutory provisions. *See* 413 F.d at 19-20. Thus, the analogous incorporation contention with respect to "routine maintenance" must likewise be rejected.

> a project is undertaken at another utility plant is more instructive than whether a project was undertaken at, for example, a textile plant. As SIGECO argues, it refers to a comparison within the relevant industry, and does not specifically mention the significance of whether or not a project has been undertaken at a particular unit. However, because it is so brief, and because it was contained in a preamble to regulatory changes that had nothing to do with routine maintenance, the preamble language does not clarify much about the frequency factor, and certainly does not indicate to the regulated community that the EPA meant any change from the interpretation it advanced in the Clay Memo.

SIGECO I, 245 F. Supp. 2d at 1020-21; *accord Ohio Edison*, 276 F. Supp. 2d at 887. In sum, EKPC's reliance on this preamble language is misplaced because this language is consistent with, and did nothing to replace, EPA's interpretation of the routine maintenance exclusion as set forth in the Clay Memo.

D. Neither EPA nor KDAQ Knew of or Approved EKPC's Capacity Expansion Projects.

EKPC asserts that it discussed all of the work undertaken at Dale Units 3 and 4 with KDAQ, and that KDAQ approved the work. EKPC Memo No. 1, at 26. This assertion, which is based solely on EKPC's own self-serving interrogatory responses, is not supported by the record, and is contradicted by the testimony of EKPC's own environmental affairs manager, Robert Hughes. For instance, Mr. Hughes specifically testified that he did not tell KDAQ that EKPC was upgrading its induced draft (ID) fans at Dale Unit 3 with new and larger fans. Deposition of Robert Hughes, February 18, 2005, at 43, 207 (Ex. 20). And while EKPC claims to have told KDAQ about the turbine replacements, Mr. Hughes admitted in a separate 30(b)(6) deposition that EKPC did not tell KDAQ that the new turbines could accept more steam than the old ones. Rule 30(b)(6) Deposition of Robert Hughes, April 13, 2005, at 145-146 (Ex. 21). Nor did Mr. Hughes provide KDAQ with any information concerning projects that were done on the boilers at the time of the turbine replacements. Ex. 20, at 42. Indeed, when asked whether he could

provide any details about his conversations with KDAQ concerning the alleged approval of the projects at Dale Units 3 and 4, Mr. Hughes admitted that he could not recall any specific information. Ex. 20, at 52.

The only written correspondence concerning any of the work at either Dale unit relates to the balanced draft conversion of Dale Unit 4, which resulted in a letter from KDAQ that the conversion did "not constitute construction, reconstruction, or modification, as defined in Regulation 401 KAR 50:010." EKPC Memo No. 1, at 26.[25] As a preliminary matter, this letter from KDAQ by its plain terms says nothing about whether the conversion was a "modification" under the NSPS (40 C.F.R. Pt. 60) or PSD (401 KAR 51:017) regulations, but rather refers to EKPC's general permitting regulation definitions in a separate provision of the Kentucky Administrative Code – 401 KAR 50:010. *See* EKPC Ex. 88.[26] Moreover, the letter that EKPC sent to KDAQ to secure this letter did not identify all of the work undertaken at Dale Unit 4. For instance, it says nothing about the new and larger turbines at Dale Unit 4, and nothing about the

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[25] Indeed, other than the letter to KDAQ concerning the balanced draft conversion (which stated nothing about installing an oversized fan system or larger turbines), EKPC did not provide any written documentation to KDAQ concerning the projects. Ex. 20, at 41. EKPC nevertheless now asserts that KDAQ formally approved the projects. Such a practice would have been contrary to KDAQ's practices, however. Roger Cook of KDAQ testified that it was his practice to tell companies to submit all formal requests for approval in writing. *See* Ex. 9, at 184-85.

[26] Even if KDAQ had approved the projects, and even if that approval had encompassed the PSD and NSPS regulations, that would still not bar enforcement by EPA. Whether EKPC's projects trigger PSD and NSPS requirements hinges on the law itself, and not on a state opinion. Although states have primary responsibility for administering and enforcing state implementation plans, EPA may directly enforce an approved SIP as federal law, either in federal district court or through an EPA administrative action. *See* 42 U.S.C. § 7413. Nothing in the statute requires Kentucky to agree with EPA's allegations. Indeed, such a requirement would be entirely contrary to the legislative scheme, which was designed to prevent states from excusing violations as a way of attracting industry. *See, e.g., United States v. Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987); *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1550 (W.D. Mo. 1990). EKPC's claim regarding the KDAQ letter concerning the balanced draft conversion illustrates the wisdom of retaining independent federal enforcement authority. As discussed above, EKPC provided incomplete information concerning its projects that would have been material to any PSD or NSPS determination. EKPC claims that the State accepted this information. Even if this were correct, federal enforcement authority would prevent errors like this one from going uncorrected.

fact that EKPC installed oversized induced draft fans as part of the conversion. *See* EKPC Ex. 87.

EKPC does not even claim to have provided this information concerning the balanced draft conversion orally. Mr. Hughes confirmed that he provided KDAQ with only a "generic discussion" of the balanced draft conversion, and did not provide KDAQ with any information on the capacity of the new fan system at Dale Unit 4. Ex. 20, at 46, 201. Mr. Hughes also testified that he did not tell KDAQ about installing new and larger turbines during his conversations concerning the balanced draft conversion, and that he never told Mr. Cook that the new turbine could accept more steam than the old one. Ex. 20, at 206; Ex. 21, at 145. Significantly, Mr. Cook, the head of the Combustion Section of the KDAQ Permit Review Branch, and the person EKPC alleges approved the projects, testified that such information would have been material to any evaluation of the work at Dale Unit 4 and that "[w]e would have needed more information to make a determination whether there may or may not be an increase in emissions." Ex. 9, at 196.

Finally, EKPC claims that EPA approved the projects in the context of EKPC's application for "early election" under the NO_x Acid Rain program. EKPC Memo No. 1, at 27. However, Mr. Hughes admits that nothing EKPC submitted to EPA said anything about installing new and larger turbines at Dale Units 3 and 4, or increasing the fan system capacity at the units. Ex. 21, at 166-68. Indeed, Mr. Hughes admitted that even as to the low NO_x burners that were installed, these meetings were not part of any request for a PSD applicability determination, and that EKPC did not view EPA as having given EKPC any approval for the projects. *Id.* at 162-63.

E. EPA Has Consistently Applied the Routine Maintenance Exclusion For Many Years.

EKPC's characterization of EPA's "secret meetings" to "fashion a new interpretation of the term 'modification'" is both melodramatic and false. EKPC Memo No. 1, at 27-30. While it is quite true that EPA did not invite utility representatives to its internal enforcement meetings, it is not true that EPA conspired to avoid formal notice and comment rulemaking by making up new interpretations of the rules in order to sue the electric utility industry. Specifically, EKPC claims that the "initiative [by EPA against the electric utility industry] sought to define RMRR [routine maintenance, repair and replacement] more narrowly than EPA had previously -- narrowing its scope from projects routine for the industry to projects routine for the unit at issue." EKPC Memo No. 1, at 28. EPA has long and consistently held that the applicable routine maintenance exclusion is narrow in scope, applies only to activities that are routine for a unit in the industry, and that no activity is categorically exempt.[27]

Moreover, in contrast to EKPC's current statements about "secret" EPA meetings and illegal changes in interpretation, the record is clear that industry has known about EPA's narrow

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[27] November 6, 1987 Letter from David P. Howekamp, EPA Region IX, to Robert T. Connery ("Casa Grande Determination") (Ex. 15 to Docket No. 61), at 3-4 (EPA determined that a proposed project would constitute a major modification and did not fall into the "narrow and limited set of exclusions" from PSD, including the exclusion for routine maintenance); Clay Memo (Ex. 2 to Docket No. 61), at 3 ("The clear intent of the PSD regulations is to construe the term 'physical change' very broadly, to cover virtually any significant alteration to an existing plant. This wide reach is demonstrated by the very narrow exclusion provided in the regulations: other than certain uses of alternative fuels not relevant here, only 'routine maintenance, repair and replacement' is excluded from the definition of physical change. . . ."); November 22, 1989 Letter from Charles Whitmore, EPA Region VII, to Roger Randolph (Ex. 14), at 1-2 ("Routine maintenance, repair, or replacement generally means regular, customary, or standard undertakings for the purpose of maintaining the plant/unit in its present condition. Projects that will significantly enhance the present efficiency or capacity of the plant/unit and that will substantially extend the useful economic life of the plant/unit generally should not be considered routine maintenance, repair, or replacement. A common sense approach is suggested."); Detroit Edison Determination (Ex. 17 to Docket No. 61), at 8 ("In formal NSR applicability determinations, EPA has consistently interpreted the exclusion for 'routine' activities narrowly.") *Accord, SIGECO I*, 245 F. Supp. 2d at 1008; *United States v. Southern Ind. Gas & Elec. Co.*, 2003 WL 446280 (S.D. Ind. Feb. 18, 2003) (*SIGECO II*); *Ohio Edison*, 276 F. Supp. 2d at 856.

interpretation of the exclusion since at least 1988, complained about it, lobbied against it, and sought to change it.[28] In fact, EPA decided to "change the approach to the RMRR [routine maintenance, repair and replacement] exclusion that we have been following for equipment replacements" in 2002 and proposed a new formal rulemaking. EKPC Memo. No. 1, at 29 *citing* 68 Fed.Reg. 61248, 61250 (Oct. 27, 2003). EPA has promulgated a new approach to equipment replacements through an entirely new rule, not by changing its interpretation of the routine maintenance exclusion that applies in this action. Moreover, as EKPC has failed to point out in its brief, this new approach to equipment replacements has not only been stayed by the D.C. Circuit,[29] but EPA has expressly stated that it is not retroactive and that it does not apply to existing enforcement cases:

> None of today's rule revisions apply to any changes that are the subject of existing enforcement actions that the Agency has brought and none constitute a defense thereto. Furthermore, prior applicability determinations on major modifications that result in control requirements in an NSR permit that currently applies to a source remain valid and enforceable as to that source.

68 Fed.Reg. at 61264. Indeed, in the preamble to its new rule, EPA expressly affirmed the validity of the old rule and its application to pending enforcement cases:

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[28] July 29, 1988 Hunton & Williams Memo (Ex. 1 to Docket No. 61), at 12-13 ("The EPA staff seem to consider the replacement work to be non-routine because replacement of a rear steam drum at a power plant is not frequently done and steam drums are not a component that is expected to need replacement during the life of a plant."); June 5, 1989 Letter from Henry Nickel, Hunton and Williams, to Polly Gault, Chief of Staff to the Secretary, U.S. Department of Energy (Ex. 6 to Docket No. 61),at enclosure p. 3 (Hunton & Williams lobbied DOE to reverse EPA's interpretation of the routine maintenance exclusion in the Clay Memo, describing EPA's interpretation as covering only those activities that "(1) are frequently done at that plant, (2) involve no major equipment, (3) are inexpensive, and (4) do not extend the life of the plant."); January 19, 1990 Hunton & Williams Memo (Ex. 7 to Docket No. 61), at 8 ("Accordingly, if the WEPCO interpretations [of the routine maintenance exclusion] were enforced, even minor repairs or replacements would likely be preceded by a request that EPA determine whether the repair or replacement could be undertaken without a permit.").

[29] *New York v. EPA*, 2003 U.S. App. Lexis 26520 (D.C. Cir. Dec. 24, 2003)(Ex. 22).

> Before promulgation of today's rule, we interpreted the phrase "routine maintenance, repair and replacement" to be limited to the day-to-day maintenance and repair of equipment and the replacement of relatively small parts of a plant that frequently require replacement.

Id. at 61270.

> We note that we continue to believe that our prior narrower and entirely case-by-case approach to the RMRR [routine maintenance, repair and replacement] exclusion was consistent with the relevant language of the CAA and a reasonable effort to effectuate its policies.

Id. at 61251. Thus, EKPC's statement in its brief that EPA officially repudiated its narrow, case-by-case interpretation of the routine maintenance exclusion is more than just disingenuous, it is flatly wrong.

F. EPA's Interpretation of the Routine Maintenance Exclusion is Not Rulemaking.

EKPC finally argues that EPA's narrow interpretation of the routine maintenance exclusion is a rule that EPA is seeking to apply retroactively. EKPC Memo No. 1, at 37-39. This argument has been dealt with thoroughly in the United States' Memorandum in Support of its Fifth Motion for Summary Judgment. *See* Docket No. 69, at 28-30. Suffice it to say that Hunton & Williams has been making this same argument since 1988,[30] and it has not worked with either the Seventh Circuit in the *WEPCO* case or with the district court in the *SIGECO* case. *See United States v. Southern Indiana Gas & Elec. Co.*, 2002 WL 31427523 at * 10 (S.D. Ind. Oct. 24, 2002) (specifically holding that EPA's historic interpretation of the routine maintenance exclusion does not constitute a new rule).[31] EPA seeks to apply here the same narrow

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[30] July 29, 1988 Hunton & Williams Memo (Ex. 1 to Docket No. 61), p. 12.

[31] Even in the *Duke Energy* case, the district court purported to follow EPA's guidance in the Clay Memo. However, as explained in our opening brief, that guidance does not support a "common in the industry" standard.

interpretation of its regulations described in guidance such as the 1988 Clay Memo, which was explicitly upheld by the Seventh Circuit as a reasonable interpretation of EPA's regulations.

IV. The Dale Projects Do Not Qualify As Pollution Control Projects.

In another attempt to limit its liability, EKPC argues that neither the NSPS nor the PSD regulations apply to its projects because they involved installation of low-NO_x burners at Dale Units 3 and 4 which EKPC contends qualified for a "pollution control project" exclusion. EKPC Memo. No. 1, at 39. Contrary to EKPC's contentions, the Dale projects are not exempt from review under either the NSPS or the PSD regulations.

EKPC's argument that the low-NO_x burner installations at the Dale units are exempt from the PSD regulations fails for a host of reasons. First, the exclusion under the PSD regulations was not even part of the applicable Kentucky regulations at the time EKPC performed the Dale projects. EKPC commenced construction on the Dale projects in 1994 and 1996. Although EPA first promulgated a pollution control project exclusion for PSD in the 1992 WEPCo Rule, 57 Fed. Reg. at 32319-22, the exclusion was not added to the Kentucky State Implementation Plan until 1998, after the projects were completed. *See* 63 Fed. Reg. 39741 (July 24, 1998). Accordingly, this rule cannot apply to the Dale projects.

Second, EKPC cannot show that it would have been entitled to an exclusion anyway. For instance, EKPC erroneously states that a 1983 EPA memo reflects EPA policy concerning pollution control projects at the time of the Dale projects. However, the 1983 guidance to which EKPC refers was explicitly reversed by EPA in 1986. *See* July 7, 1986 Memo from Gerald A.

See Memorandum in Support of United States First Motion for Summary Judgment (Docket No. 61), at 12-19, 30-34.

Emison, EPA Office of Air Quality, Planning and Standards (Ex. 15 to Docket No. 56), at 2. Nor did EKPC attempt to comply with pre-existing policies in effect before the exclusion as described in the WEPCO rule, which would have required EPA to affirmatively evaluate whether a project is environmentally beneficial, considering the project's overall environmental consequences through a case-by-case assessment of net emissions and overall impact on the environment. *See* 57 Fed. Reg. at 32320; January 30, 1990 Letter from David Kee, EPA, to Timothy Method, Indiana Dept. of Envtl. Management (Ex. 2 to Docket No. 56), at 2. Nor would EKPC's projects have been excluded under later-issued EPA guidance concerning pollution control projects, because such guidance was explicitly issued to apply *only* to non-utilities, and by its terms did not create any judicially enforceable rights. July 1, 1994 Memo from John S. Seitz, EPA Office of Air Quality, Planning and Standards (Ex. 23). Moreover, even if this guidance had been made applicable to utilities, EKPC never attempted to meet the necessary requirements to qualify under the guidance. For example, EKPC did not obtain a determination of whether its low-NO_x burners qualified for the pollution control policy before beginning construction nor did it give the public an opportunity to review and comment on the projects. *See id.* at 3-4 (outlining necessary procedural safeguards to be followed to qualify for the policy).

Third, EKPC could not even rely on the pollution control project exclusion if it were to belatedly seek permission for its projects today. The D.C. Circuit in *New York* struck down the pollution control project exclusion as contrary to the Act's requirement that PSD apply to all "changes." *See New York*, 413 F.3d at 41-42 ("we hold that EPA lacks authority to create [pollution control projects] exemptions from NSR, and we vacate those parts of the *1992 and*

2002 rules") (emphasis added).[32] Thus, EKPC's low-NO_x burner work cannot be excluded as pollution control projects under the PSD regulations.

EKPC has also not shown that it is entitled to the pollution control project exclusion provided in the NSPS regulations. Under the NSPS regulations, a pollution control project is excluded only if its "primary function is the reduction of air pollutants" and it has not "removed" or "replaced" an emission control system with a system that is "less environmentally beneficial." 40 C.F.R. § 60.14(e)(5). The Sixth Circuit has characterized this provision as a "*de minimis* exception . . . to permit a source to install a pollution control system that would bring about a major decrease in emissions of one pollutant while causing a smaller, incidental increase in emissions of another pollutant." *National-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 840 (6th Cir. 1988). EKPC has failed to cite any evidence that its work to Dale Units 3 and 4 would reduce NO_x emissions while causing only a small, incidental increase of another pollutant as required by *National-Southwire*. *See* EKPC Memo. No. 1 at 39. In fact, quite the opposite is true: while low-NO_x burners may result in lower NOx emissions per million BTU, EPA has alleged large increases in sulfur dioxide emissions increases at the Dale units from the Dale Unit 3 and 4 capacity expansion projects. Therefore, this Court should reject EKPC's unsupported claim that the work at Dale Units 3 and 4 is excluded from NSPS applicability as well under the pollution control project exclusion.

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[32] EKPC wrongly states that the *New York* decision only struck down the exclusion in the 2002 rules despite clear language in the case to the contrary. EKPC Memo. No. 1, at 39 n.94.

V. The PSD Regulations Define A Source As Encompassing An Entire Plant.

EKPC's final argument is that the PSD regulations do not apply to physical changes involving work on the Dale Unit 3 and 4 turbines, even though those changes have been alleged to increase emissions. EKPC Memo No. 1, at 40. Specifically, EKPC proposes a tortured reading of the regulatory term "source" to argue that the turbines at Dale Units 3 and 4 are not part of a "major stationary source" under the PSD regulations.[33] EKPC's argument should be rejected because it is inconsistent with the plain language of the PSD regulations, EPA's authoritative interpretations of those regulations, established caselaw, and EKPC's own admissions in this case.

Under the PSD regulations, a major modification is defined as "any physical change in or change in the method of operation of a *major stationary source* that would result in a significant net emissions increase." 40 C.F.R. § 51.166(b)(2). "Major stationary source" is defined as:

> [a]ny of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam *electric plants* of more than 250 million British thermal units per hour heat input. . . .

40 C.F.R. § 51.166(b)(1)(emphasis added). In other words, the major stationary source for electric utilities is defined as the entire *plant*. This reading is confirmed by the preamble:

> The definition of source for PSD purposes has been made more liberal than the previous regulations. . . . This generally relates to the common notion of a plant. Smaller portions of such a plant no longer will be examined for applicability purposes.

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[33] EKPC also argues that the turbines at Dale Units 3 & 4 are not part of the "affected facility" under the NSPS regulations, which by their plain terms apply NSPS to "steam generating units." EKPC Memo No. 1, at 39. Essentially, EKPC argues that the turbine is not the steam generating unit. The United States does not contend otherwise.

45 Fed. Reg. at 52680.[34]

A turbine is an essential part of a fossil fuel-fired steam electric plant. It defies common sense to suggest otherwise. The modifier "electric" in the "major stationary source" definition demonstrates that turbines are included in this definition of source because a turbine is required to turn the steam into electricity. Without the turbine, the plant would not be an electric plant, it would only be a steam plant. This reading is also confirmed by the plain meaning of the word "plant" which is defined by Merriam-Webster in relevant parts as "the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business" and "a factory or workshop for the manufacture of a particular product."[35] The turbine, which is necessary to manufacture electricity (the primary activity of the Dale plant), is clearly part of the plant.[36]

Consistent with common sense and the plain regulatory text, EPA has consistently interpreted the applicable PSD regulations as including turbines as part of a "major stationary source" subject to review under the PSD regulations. *See* August 28, 1998 Letter from Donald

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[34] The EPA continued that "for added clarification, pollutant-emitting activities will now be considered part of the same 'plant' if they belong to the same 'major group' as described in the Standard Industrial Classification Manual." *Id.* A closer examination of the Standard Industrial Classification Manual also reveals that turbines are indisputably considered part of a plant. The Standard Industrial Classification Manual group 49 "includes establishments engaged in the generation, transmission, and/or distribution of electricity or gas or steam." *See* Standard Industrial Classification Major Group 49, http://www.osha.gov/pls/imis/sic_manual.display?id=42&tab=group (Ex. 24). Turbines generate electricity and are thus part of this major group.

[35] http://www.m-w.com.

[36] In addition to the explicit definition of "major stationary source" provided in the PSD regulations (which EKPC nowhere cites), EPA's regulations also contain a general definition of "stationary source" which refers to any "building, structure, facility, or installation." 40 C.F.R. § 51.166(b)(5), (6). EPA has interpreted these terms broadly in its PSD regulations to cover an entire plant and all "pollutant-emitting activities." 40 C.F.R. § 51.166(b)(6). EKPC cannot seriously contest that generating electricity at a coal-fired power plant is not a pollutant-emitting "activity."

Toensing, U.S. EPA Region VII, to Wayne Penrod, Sunflower Electric (Ex. 25), at 2 (holding that changes to a turbine are changes to the source which could trigger PSD: "a physical change at the source (*i.e.*, the upgrading changes involving the turbine) may have caused a significant increase at the source of pollutants regulated by the state's PSD regulation."); Detroit Edison Determination (Ex. 17 to Docket No. 61), at 4, 15-17 (finding that proposed replacement and reconfiguration of the high pressure section of two steam turbines constitutes a non-routine physical change under the PSD regulations).[37]

Caselaw also confirms that the PSD program is intended to cover an entire plant, and that PSD applicability is not limited to changes at steam generating units, which are the sole concern of NSPS. For instance, the D.C. Circuit specifically upheld EPA's ability to promulgate PSD regulations that apply to an entire plant, including all of the "activities" that take place at that plant. *See Alabama Power*, 636 F.2d. at 397. In so holding, the D.C. Circuit contrasted the PSD program to the NSPS program, and held that "[w]ith regard to PSD, however, Congress clearly envisioned that *entire plants* could be considered to be single 'sources.'" *Id.* (emphasis added).[38] The court similarly held that "Section 169(1) [of the PSD provisions] clearly does mean that a

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[37] Numerous other guidance and determinations confirm that PSD applies to changes at an entire plant, even if they do not involve a boiler or other steam generating unit. *See In re: Rochester Public Utilities*, PSD Appeal No. 03-03 (Envt'l Appeals Bd., U.S. EPA Aug. 3, 2004) (Ex. 26), at 1, 6, 9, 22-23 (noting that tapping steam lines between turbines and boiler triggered PSD review and that "Pre-construction review is required for any new major stationary source or any major modification to a major stationary source in an area subject to the PSD requirements of the Clean Air Act."); December 8, 1988 Letter from David Kee, EPA, to Morton Sterling, Detroit Edison (Ex. 27), at 1 ("[T]he PSD regulations address the total source. This is contrasted with the new source performance standards where applicability is done on an affected facility basis which in this case could be a boiler."); August 6, 2001 Letter from John Seitz, EPA, to Patrick Raher (Ex. 28), at 2 ("In contrast [to NSPS], NSR applicability determinations are plant-wide"); July 7, 1980 Letter from Edward Reich, EPA, to Sandra Gardebring, EPA (Ex. 29), at 2 ("Major modification considers changes over the entire source, the generating plant, rather than changes for each boiler.").

[38] By contrast, the NSPS regulations apply only to modifications of an "existing facility" which, in the context of utilities, is specifically defined as the "steam generating unit" apparatus. *See* 40 C.F.R. § 60.2 and Subpart Da.

plant is to be viewed as a source. . . . We view it as reasonable, for instance, to define 'facility' and 'installation' broadly enough to encompass an *entire plant*." *Id.* at 396 (emphasis added). The same result was reached by the Ninth Circuit, which held that unlike NSPS, the PSD program is "site-oriented" so that it "covers the whole stationary source, and focuses on where the plant will be located and its potential effect on its environs." *Northern Plains*, 645 F.2d at 1356.

Finally, EKPC has itself admitted that the turbines at issue are part of its Dale coal-fired steam electric plants for purposes of the PSD regulations. For example, when asked to describe "each of the major components" of "each of the individual Electricity Generating Units at the EKPC Plants," EKPC stated that "Dale Unit 3 consists of a boiler, a *turbine*, generator and precipitator" and "Dale Unit 4 consists of a boiler, a *turbine*, generator, and precipitator." EKPC Feb. 25, 2005 Responses to Interrogatories (Ex. 55 to Docket No. 65), p. 10 (emphasis added). EKPC further clarified the function of each of these components stating: "The boiler supplies steam to a turbine. The turbine turns the generator, producing electricity. The precipitator treats the flue gases before their release." *Id.* EKPC has further admitted that "[a]t all times after 1980, the Dale *Plant* has been a 'major stationary source,'" for PSD regulatory purposes. EKPC Responses to Request for Admissions, No. 9 (Exhibit 56 to Docket No. 65) (emphasis added). Thus, based on EKPC's own admissions, there can be no factual dispute that the turbines at Dale Units 3 and 4 are part of a "major stationary source" under the PSD regulations.

In sum, the plain language of the PSD regulations establishes that the "major stationary source" for a fossil-fuel fired steam electric plant includes the turbine. Even if the language in the PSD regulations were not clear, deference is due to EPA's interpretation of the term "major

stationary source" in its PSD regulations because it is not "plainly erroneous or inconsistent with the regulations." *Auer*, 519 U.S. at 461; *National-Southwire,* 838 F.2d at 839 (deferring to EPA's interpretation of "stationary source" in the NSPS regulations). Given the language of the PSD regulations, EPA's historic interpretation of those regulations, the caselaw, and EKPC's own admissions, this Court should find the Dale turbines are part of the Dale Plant and therefore, part of a "major stationary source" subject to the PSD regulations.

CONCLUSION

For the foregoing reasons, EKPC's Motion for Summary Judgment No. 1 should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to EKPC's Summary Judgment Motion No. 1 was served on February 13, 2006, on the persons listed below:

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